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COURT OF APPEALS

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COURT OF APPEALS CASES

PEOPLE v PENNEBAKER

Docket No. 304708. Submitted September 6, 2012, at Detroit. Decided September 13, 2012, at 9:00 a.m.

Connie Lee Pennebaker pleaded guilty in the Oakland Circuit Court of operating a motor vehicle while intoxicated with an occupant less than 16 years old, second offense, MCL 257. 625(7)(a)(*ii*), and was sentenced to 18 months' probation and 30 days in the electronic-monitoring work-release program. The Prosecutor appealed. The Court of Appeals denied the prosecutor's application, *People v Pennebaker*, unpublished order of the Court of Appeals, entered August 18, 2011 (Docket No. 304708), but the Supreme Court remanded this case for consideration as on leave granted. 490 Mich 910 (2011).

The Court of Appeals *held*:

MCL 257.625(7)(a)(*ii*) provides that a person convicted of operating a motor vehicle while intoxicated with an occupant less than 16 years old, second offense, shall be sentenced to either (1) imprisonment for not less than 1 year or more than 5 years' in prison, or (2) probation with imprisonment in the county jail for not less than 30 days or more than 1 year and community service for not less than 60 days or more than 180 days. The word "shall" indicates mandatory rather than discretionary action. The placement of an electronic-monitoring device on a defendant does not constitute imprisonment in the county jail as required by MCL 257.625(7)(a)(*ii*), because the tether program is a restriction, not a confinement or jail. It is also not the equivalent of a traditional work-release program, which is specifically authorized by MCL 801.252. The court erred by sentencing defendant to 30 days in the electronic-monitoring work-release program because MCL 257.625(7)(a)(*ii*) clearly mandates that defendant be sentenced to a minimum of 30 days in jail. While the Legislature has given the sheriff and trial judges authority to reduce the prisoner population by means of work-release programs, under MCL 801.55(e), such a program must be authorized by law. MCL 257.625(7)(a)(*ii*) does not authorize a work-release program; rather, the required minimum sentence includes 30 days in jail.

Reversed and remanded for resentencing.

CRIMINAL LAW — SENTENCES — OPERATING A MOTOR VEHICLE WHILE INTOXICATED, SECOND OFFENSE — OCCUPANT LESS THAN 16 YEARS OLD — MANDATORY JAIL TERMS — ELECTRONIC TETHERS.

A person convicted of operating a motor vehicle while intoxicated with an occupant less than 16 years old, second offense, MCL 257.625(7)(a)(*ii*), shall be sentenced to either (1) imprisonment for not less than 1 year or more than 5 years' in prison, or (2) probation with imprisonment in the county jail for not less than 30 days or more than 1 year and community service for not less than 60 days or more than 180 days; the word "shall" indicates mandatory rather than discretionary action; the placement of an electronic-monitoring device on a defendant does not constitute imprisonment in the county jail as required by MCL 257.625(7)(a)(*ii*), because the tether program is a restriction, not a confinement or jail; a tether program is also not the equivalent of a traditional work-release program from a county jail, which is specifically authorized by MCL 801.252.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Tanya L. Nava*, Assistant Prosecuting Attorney, for the people.

Richard I. Lippitt, P.C. (by *Richard I. Lippitt*), for defendant.

Before: CAVANAGH, P.J., and SAAD and DONOFRIO, JJ.

SAAD, J. On March 3, 2011, defendant, Connie Lee Pennebaker, pleaded guilty of operating a motor vehicle while intoxicated, with an occupant less than 16 years old, MCL 257.625(7)(a), and stipulated that it was her second offense, subject to sentence enhancement, MCL 257.625(7)(a)(*ii*). The trial court sentenced defendant to 18 months' probation and 30 days in the electronic-monitoring work-release program. On August 18, 2011, this Court entered an order that denied the prosecution's application for leave to appeal. *People v Pennebaker*, unpublished order of the Court of Appeals,

entered August 18, 2011 (Docket No. 304708). However, on November 21, 2011, the Michigan Supreme Court remanded the case to this Court for consideration as on leave granted. *People v Pennebaker*, 490 Mich 910 (2011).

I. FACTS AND PROCEEDINGS

At approximately 6:30 p.m. on December 31, 2010, police officers stopped defendant's vehicle while she was driving her two grandchildren, both of whom were under 16 years old. Defendant had been drinking since 2:00 p.m., and estimated that she had consumed approximately a half pint of vodka. A breathalyzer test showed that defendant had .13 grams of alcohol per 100 milliliters of blood. Defendant admitted that the alcohol had substantially affected her mental, physical, and driving abilities, and she also admitted that she was convicted in 2007 of operating a motor vehicle while impaired.

As noted, defendant pleaded guilty of operating a motor vehicle while intoxicated, second offense. At sentencing on June 2, 2011, the prosecutor asked the court to sentence defendant to 30 days in jail without work release as set forth in the plea agreement. On the record, the trial judge observed that defendant had been under the direct supervision of the court since March 10, 2010. According to the trial judge, defendant had participated in the required counseling, she had stopped using benzodiazepines, her daily tests for drugs and alcohol had been negative, and she had received wholly positive reports from her case manager at Community Corrections. Because of these efforts, the trial court opined that defendant "earned the right to enter the work release program[.]" The judge explained:

> And I'll state for the record that I had an opportunity actually yesterday, the Sheriff's Department presented to the Judges of the Circuit Court their electronic monitoring work release program wherein they described the monitoring that is imposed upon defendants. And we were advised that it is considered a custodial program, that she remains in the custody of the Sheriff's Department and, therefore, it would not be a suspension to allow her to enter the work release program.

The parties agree that the program would allow defendant to serve her sentence at home, while wearing an electronic tether. Thus, although the prosecutor argued that both statutory and caselaw prohibit a court from sentencing defendant to a tether program under these circumstances, the trial court sentenced defendant to 30 days in the electronic monitoring work-release program, community service, probation, fines and vehicle immobilization.

II. ANALYSIS

The prosecutor correctly argues that the trial court erred, as a matter of law, by sentencing defendant to the work-release program in lieu of the statutorily required 30-day incarceration as mandated by MCL 257.625(7)(a)(*ii*)(B). We review de novo the interpretation of a statute as a question of law. *People v Flick*, 487 Mich 1, 8-9; 790 NW2d 295 (2010). And, although in general, "[t]he imposition of a sentence is reviewed for an abuse of discretion," *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008), when, as here, there is a clear statutory direction regarding sentencing, then this is not a matter of trial court discretion, but rather a failure to comply with a legislative mandate which requires reversal.

As a preliminary matter, we recognize that prior to sentencing, defendant took consistent steps to abide by

all requirements imposed by the court. Moreover, though the record lacks details about the electronic-monitoring program offered to defendant, we take judicial notice of the significant problem of jail overcrowding in many of Michigan's counties, and we recognize the good efforts of the sheriff's department in taking affirmative and conscientious steps to alleviate this burden on both law enforcement and the taxpaying community. Despite these laudable efforts, however, under the facts of this case we hold that Oakland County's electronic-monitoring work-release program does not fulfill the mandatory 30-day incarceration requirement of MCL 257.625(7)(a)(*ii*)(B).

MCL 257.625(7) provides, in relevant part:

> A person, whether licensed or not, is subject to the following requirements:
>
> (a) He or she shall not operate a vehicle [when that person has a blood alcohol level of .08 grams or more per 100 milliliters of blood] while another person who is less than 16 years of age is occupying the vehicle. A person who violates this subdivision is guilty of a crime punishable as follows:
>
> * * *
>
> (*ii*) If the violation occurs within 7 years of a prior conviction or after 2 or more prior convictions, regardless of the number of years that have elapsed since any prior conviction, a person who violates this subdivision is guilty of a felony and shall be sentenced to pay a fine of not less than $500.00 or more than $5,000.00 and to either of the following:
>
> (A) Imprisonment under the jurisdiction of the department of corrections for not less than 1 year or more than 5 years.
>
> (B) Probation with imprisonment in the county jail for not less than 30 days or more than 1 year and community

> service for not less than 60 days or more than 180 days. Not less than 48 hours of this imprisonment shall be served consecutively. This term of imprisonment shall not be suspended.

As our Supreme Court explained in *Flick*, 487 Mich at 10-11:

> The overriding goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. The touchstone of legislative intent is the statute's language. The words of a statute provide the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the overall context in which they are used. An undefined statutory word or phrase must be accorded its plain and ordinary meaning, unless the undefined word or phrase is a "term of art" with a unique legal meaning. When we interpret the Michigan Penal Code, we do so according to the fair import of [the] terms, to promote justice and to effect the objects of the law. [Quotation marks and citations omitted.]

The plain language of MCL 257.625(7)(a)(*ii*) and MCL 257.625(7)(a)(*ii*)(B) provide that, here, the trial judge did not have discretion to sentence defendant to less than 30 days in jail. MCL 257.625(7)(a)(*ii*) states that a defendant "shall be sentenced . . . to either of the following." This unequivocally means that the trial court *must* sentence defendant to one of the two options, a term in prison or not less than 30 days in jail and community service. The "use of the term 'shall' . . . indicates mandatory rather than discretionary action." *People v Grant*, 445 Mich 535, 542; 520 NW2d 123 (1994). MCL 257.625(7)(a)(*ii*)(B) further states that "[t]his term of imprisonment shall not be suspended." This language unequivocally means that the trial court must sentence a defendant to a minimum of 30 days in the county jail.

As this Court opined in *People v Morgan*, 205 Mich App 432, 433; 517 NW2d 822 (1994):

> Under our system of state government, the Legislature makes the law, the Governor executes it, and the courts construe and enforce it. *People v Palm*, 245 Mich 396; 223 NW 67 (1929). The Legislature alone is conferred with the power to fix the minimum and maximum punishment for all crimes. *People v Smith*, 94 Mich 644; 54 NW 487 (1893). A sentence outside statutory limits is invalid. *People v Whalen*, 412 Mich 166; 312 NW2d 638 (1981).

The placement of an electronic-monitoring device on defendant is not "imprisonment in the county jail" as required by the statute. *People v Britt*, 202 Mich App 714, 717; 509 NW2d 914 (1993). The Court in *Britt* observed:

> Electronic tethers were not intended to form the bounds of confinement. Rather, the electronic tether is simply a surveillance device for monitoring a defendant's presence in his residence during curfew hours. [*Id*.]

"The tether program is a restriction, not a confinement, and is not 'jail' as that term is commonly used and understood." *People v Reynolds*, 195 Mich App 182, 184; 489 NW2d 128 (1992). The panel in *People v Smith*, 195 Mich App 147, 152; 489 NW2d 135 (1992), perhaps explained the distinction most directly:

> Under no circumstances can we reasonably conclude that confinement in one's home or apartment is the equivalent of confinement "in jail." This is so even where, as here, the conditions of home confinement require the person confined to go directly to work, to return home immediately from work, and to be at home at all times unless approval is given by a probation officer. Home detention does not include the highly structured setting of a prison or jail. One cannot remain on the phone for extended periods, invite friends for extended visits, order a pizza, watch

> television during periods of one's own choosing, or have free access to the refrigerator in jail.

Contrary to defendant's arguments, an at-home electronic-monitoring program is also not equivalent to traditional work-release programs. Pursuant to MCL 801.251, the Legislature has specifically allowed courts to release inmates from jail during necessary and reasonable hours for work, substance abuse treatment, counseling, and other statutorily authorized activities. However, this statute contemplates that inmates will return to jail during hours when they are not engaged in the statutorily-permitted activities. Indeed, the statute specifies that a court "may grant to the person the *privilege of leaving* the jail during necessary and reasonable hours" *Id*. (emphasis added). The Legislature has also given the sheriff and trial judges the authority to reduce prisoner population by means of work-release programs. MCL 801.55. However, the work-release programs must be "authorized by law." MCL 801.55(e). As discussed, the statute at issue, MCL 257.625(7)(a)(*ii*)(B), does not authorize any sentence less than imprisonment in jail for 30 days for a person convicted under that subsection. Again, the plain language of MCL 257.625(7)(a)(*ii*)(B) mandates that defendant serve at least 30 days in the county jail, and a tether does not amount to imprisonment in jail.

As previously noted, we are mindful of the serious nature of jail overcrowding in Michigan, including Oakland County, and the program the sheriff designed to handle this problem is a thoughtful method designed to deal with this difficult issue. However, it is for the Legislature to decide whether to alter the minimum and maximum punishment for this crime which, in this case, involved not only intoxicated driving, but the transportation of minors and a prior operating a motor

vehicle while intoxicated conviction. Unless and until the Legislature decides to change the required penalty for MCL 257.625(7)(a)(*ii*), the plain language of the statute and our caselaw compel us to reverse the trial court's sentence because it ignores the clear legislative mandate.

Reversed and remanded for resentencing. We do not retain jurisdiction.

CAVANAGH, P.J., and DONOFRIO, J., concurred with SAAD, J.

PEOPLE v TED ANDERSON (ON REMAND)

Docket No. 300641. Submitted August 15, 2012, at Lansing. Decided September 18, 2012, at 9:00 a.m.

Ted A. Anderson was charged with manufacturing less than 5 kilograms or fewer than 20 plants of marijuana, MCL 333.7401(1) and (2)(d)(*iii*), after the police discovered marijuana plants and plant material in his home in June 2009. Defendant moved in the Kalamazoo Circuit Court for dismissal of the charge, citing the affirmative defense provided by § 8 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26428(a)(2). The court, J. Richardson Johnson, J., denied the motion, concluding that defendant had failed to establish the elements of a § 8 defense, and further ruled that because of that failure defendant would not be able to present a § 8 defense at his trial. The Court of Appeals, HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ., affirmed the trial court's order denying defendant's dismissal motion, concluding that the court properly precluded him from presenting a § 8 defense. 293 Mich App 33 (2011). In lieu of granting defendant's application for leave to appeal, the Supreme Court vacated the Court of Appeals' judgment and remanded this case to the Court of Appeals for reconsideration in light of *People v Kolanek*, 491 Mich 382 (2012). 491 Mich 851 (2012).

On remand, the Court of Appeals *held*:

To assert a valid § 8 affirmative defense, MCL 333.26428(a)(2), under the MMMA, MCL 333.26421 *et seq*., a defendant does not have to satisfy the requirements of § 4 of the MMMA, MCL 333.26424, which provides immunity from prosecution. A § 8 defense must be raised by the defendant in a pretrial motion for an evidentiary hearing and the defendant bears the burden at the hearing of establishing each of the elements in § 8(a). Without weighing the evidence, assessing credibility, or resolving factual disputes at the hearing, the trial court must dismiss the charges if after the hearing the court concludes that the defendant has made a prima facie showing as to the elements in § 8(a) and that there are no material factual disputes on those elements. Alternatively, if the defendant fails to establish one or more elements of the

§ 8(a) defense at the hearing, the trial court must deny the defendant's motion for dismissal and the defendant is prohibited from presenting a § 8 defense at trial. However, if the defendant presents sufficient evidence to establish each of the elements of a § 8 defense but there are material questions of fact on one or more elements, then the trial court must deny the motion to dismiss and the affirmative defense must be submitted to the jury. The Court of Appeals reviews the evidence de novo to determine whether the trial court properly granted or denied the defendant's motion to dismiss under § 8. The court did not err when it determined that, to the extent that defendant failed to present sufficient evidence to establish his § 8 defense, he would be unable to present that defense at trial. However, the court did err when it determined that the requirements of § 4 were applicable to the level of proof required for establishing the affirmative defense under § 8. Defendant was not required to prove that his plants were kept in an enclosed, locked facility. The court erroneously determined that the amount of plants and plant material stated in § 4 as reasonable altered defendant's burden of proof under § 8. The court erroneously assessed the weight and credibility of defendant's evidence and erroneously resolved factual disputes. A new evidentiary hearing in the trial court was necessary because the parties' decisions were made on the basis of the mistaken assumption that the court had authority to assess the weight and credibility of the evidence and to make findings of fact.

Trial court order vacated and case remanded for further proceedings.

CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — CRIMINAL DEFENSES — EVIDENTIARY HEARINGS — DISMISSAL OF CHARGES.

To assert a valid § 8 affirmative defense, MCL 333.26428(a)(2), under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., a defendant does not have to satisfy the requirements of § 4 of the MMMA, MCL 333.26424, which provides immunity from prosecution; a § 8 defense must be raised by the defendant in a pretrial motion for an evidentiary hearing and the defendant bears the burden at the hearing of establishing each of the elements in § 8(a); without weighing the evidence, assessing credibility, or resolving factual disputes at the hearing, the trial court must dismiss the charges if after the hearing the court concludes that the defendant has made a prima facie showing as to the elements in § 8(a) and that there are no material factual disputes on those elements; alternatively, if the defendant fails to establish one or more elements of the § 8(a) defense at the hearing, the trial court must deny the defendant's motion for dismissal and

> the defendant is prohibited from presenting a § 8 defense at trial; however, if the defendant presents sufficient evidence to establish each of the elements of a § 8 defense, but there are material questions of fact on one or more elements, then the trial court must deny the motion to dismiss and the affirmative defense must be submitted to the jury; the Court of Appeals reviews the evidence de novo to determine whether the trial court properly granted or denied the defendant's motion to dismiss under § 8.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jeffrey R. Fink*, Prosecuting Attorney, and *Cheri L. Bruinsma*, Assistant Prosecuting Attorney, for the people.

John Targowski for defendant.

ON REMAND

Before: HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM. Defendant Ted Allen Anderson's interlocutory appeal is before this Court again on remand from our Supreme Court. See *People v Anderson*, 492 Mich 851 (2012). In his original appeal to this Court, Anderson argued that the trial court erred in two respects: (1) that it erred when it required him to present expert testimony to establish the "reasonableness of the amount of plant material" that he had possessed for purposes of qualifying for the affirmative defense provided under § 8 of Michigan's Medical Marihuana Act,[1] MCL 333.26428(a)(2), and (2) that it erred when it determined that he could not present a § 8 defense at trial because he had failed to establish the elements of that defense at his § 8 hearing. As more

[1] We note that the Legislature used the spelling "marihuana" in the statute; however, this Court uses the more common spelling, "marijuana," in its opinions.

fully explained below, we conclude that the trial court erred in the conduct of Anderson's § 8 hearing. Nevertheless, because the trial court and parties did not have the benefit of our Supreme Court's recent decision in *People v Kolanek*, 491 Mich 382; 817 NW2d 528 (2012) when conducting the hearing, and because there was considerable confusion about the elements applicable to a § 8 defense, we conclude that the proper remedy is to remand this matter to the trial court for a new hearing. For that reason, we vacate the trial court's opinion and order denying Anderson's motion for dismissal under § 8 and remand for a new hearing in accord with our Supreme Court's decision in *Kolanek* and this opinion.

I. BASIC FACTS

Anderson was arrested after police officers discovered marijuana plants and plant material in his home in June 2009. *People v Anderson*, 293 Mich App 33, 39-40; 809 NW2d 176 (2011) (M. J. KELLY, J., concurring), vacated 491 Mich 851 (2012). The prosecutor charged him with manufacturing less than 5 kilograms or fewer than 20 plants of marijuana, MCL 333.7401(1) and (2)(d)(*iii*), and the district court bound Anderson over for trial in March 2010. *Id.* at 41. In April 2010, Anderson moved for dismissal of the charge under § 8 of the Medical Marijuana Act. *Id.* at 41-42.

After a hearing, the trial court determined that Anderson had not established the elements of a § 8 defense and denied his motion. *Id.* at 42. Moreover, it determined that because Anderson failed to establish the elements of his defense at the hearing, he would not be able to present a § 8 defense at his trial. *Id.* In August 2010, the trial court entered an order denying Anderson's motion to dismiss and precluded him from offering a § 8 defense at trial. *Id.* Anderson then applied

for leave to appeal to this Court and asked this Court to stay the lower court proceedings, which requests this Court granted. *Id.*

On appeal, Anderson argued that the trial court improperly required him to prove through expert testimony that the amount of marijuana plants and plant material that he had possessed was reasonably necessary to ensure the uninterrupted availability of marijuana to treat his back pain. He also argued that the trial court erred when it precluded him from presenting a § 8 defense at his trial. This Court determined that the trial court did not err when it denied Anderson's motion to dismiss and did not err when it precluded him from presenting his § 8 defense at trial. For those reasons, we affirmed the trial court's order denying Anderson's motion and precluding him from presenting a §8 defense at trial. *Id.* at 35 (opinion of the court).

Anderson appealed to our Supreme Court and it held this Court's judgment in abeyance pending its decision in *Kolanek*. After the Supreme Court issued its opinion, it again considered Anderson's appeal and, in lieu of granting leave, it vacated this Court's judgment and remanded the case for reconsideration in light of its decision in *Kolanek*. *Anderson*, 492 Mich at 851.

II. THE AFFIRMATIVE DEFENSE UNDER § 8

A. STANDARD OF REVIEW

Anderson argues that the trial court erred by requiring him to establish through an expert that the amount of marijuana that he had possessed was reasonably necessary and by precluding him from presenting a § 8 defense at trial on the basis of his failure to establish his defense at the hearing. This Court reviews de novo whether the trial court properly interpreted and applied

the Medical Marijuana Act. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

B. *PEOPLE v KOLANEK*

In *Kolanek*, our Supreme Court clarified the nature and scope of the Medical Marihuana Act's immunity provision provided under § 4, MCL 333.26424, and the affirmative defense provided under § 8, MCL 333.26428. *Kolanek*, 491 Mich at 394-397. Specifically, the Court examined whether a "defendant must satisfy the requirements of § 4 in order to have a valid defense under § 8." *Id.* at 399. And, on the basis of the plain language of the statute, it concluded that the requirements stated under § 4 do not apply to the affirmative defense provided under § 8. *Id.* at 401-402. Because a defendant does not have to meet the requirements stated under § 4 to assert a defense under § 8, our Supreme Court reversed this Court's decision to the contrary in *People v King*, 291 Mich App 503; 804 NW2d 911 (2011). *Kolanek*, 491 Mich at 403-404.

After concluding that the requirements stated under § 4 do not apply to the defense provided under § 8, our Supreme Court turned to the procedure for asserting a § 8 defense. The Court first concluded that the § 8 defense "cannot be asserted for the first time at trial"; rather, in order to properly raise such a defense, the defendant must raise it in "a pretrial motion for an evidentiary hearing." *Id.* at 411. At the evidentiary hearing, the defendant bears the burden of presenting evidence to establish each of the elements stated under § 8(a). *Kolanek*, 491 Mich at 412-413, 415-416; see also MCL 333.26428(a).

If, after presenting his or her evidence at the hearing, the trial court concludes that the defendant has made a prima facie showing as to the elements stated under

§ 8(a) and that there are no material factual disputes on those elements, the trial court must dismiss the charges. *Kolanek*, 491 Mich at 412, citing MCL 333.26428(b). If, however, the defendant fails to establish one or more elements of the § 8 defense at the hearing, the trial court must deny the defendant's motion for dismissal and "the defendant cannot assert § 8(a) as a defense at trial." *Id.* Finally, if the defendant presents sufficient evidence to establish each of the elements of a § 8 defense at the hearing, but there are material questions of fact on one or more elements, then the trial court must deny the motion to dismiss and the defense must be submitted to the jury. *Id.*

As explained in *Kolanek*, the trial court's role at the evidentiary hearing is limited: it must determine whether the defendant has presented sufficient evidence from which a reasonable jury could conclude that the defendant established the elements of his or her § 8 defense and then determine, given the evidence presented at the hearing, if there is a material factual dispute concerning one or more of those elements. *Id.* at 411-413. The trial court may not weigh the evidence, assess credibility, or resolve factual disputes at the hearing. *Id.* at 411 ("Questions of fact are the province of the jury, while questions of law are reserved to the courts."). Rather, the trial court must determine—as a matter of law—if the defendant established his or her right to have the charges dismissed under § 8, or if there are material factual disputes that must be resolved by a jury. *Id.* at 411-413. Similarly, when reviewing a trial court's decision after such a hearing, this Court must review the evidence de novo to determine whether the trial court properly granted or denied the defendant's motion to dismiss under § 8. See *Anderson*, 293 Mich App at 60 (M. J. KELLY, J., concurring).

C. ANDERSON'S EVIDENTIARY HEARING

At his hearing, Anderson presented evidence from his physician describing the nature and background of his back condition and how she had treated his back condition over a lengthy period of time. His physician also testified that she had told Anderson that he might benefit from the use of marijuana to treat his back condition. Anderson testified about his efforts to cultivate marijuana and said that he had cultivated the plants and plant material found in his home in order to treat his back pain. He also testified about his use of marijuana and stated that the amount that he had on hand was less than a three-month supply, which his physician testified was a reasonable amount to have.

After the close of proofs, Anderson's trial lawyer argued that the undisputed evidence established that Anderson's physician had told him that he might receive a therapeutic benefit from the use of marijuana to treat his back condition, and that she had made that statement as part of a bona fide physician-patient relationship. He also argued that Anderson's physician's testimony that a three-month supply would be reasonable, when combined with Anderson's testimony about the amount of plant material that he typically consumed in order to relieve his pain, established that the amount that he had used to treat his condition was reasonably necessary.

The prosecutor argued that Anderson had failed to establish his defense. Specifically, he maintained that Anderson's physician's testimony that she had told Anderson that marijuana would benefit him prior to his arrest was not credible because she had not documented the advice. He also argued that the amount of plant material found in Anderson's home was evidence that he had more than was reasonably necessary.

The trial court issued its opinion and order in August 2010. It found that Anderson possessed more than was reasonably necessary because the amount he possessed was more than the amounts provided under § 4 and he otherwise failed to show that "his condition was so unique he needed to grow and use more than that." In addition, the trial court found that the plants were not in an enclosed locked facility as required under § 4. On the basis of these findings, the trial court denied Anderson's motion and precluded Anderson from pursuing a § 8 defense at trial.

D. APPLICATION OF THE LAW

The trial court did not err when it determined that, to the extent that Anderson failed to present sufficient evidence to establish his § 8 defense, he would be unable to present that defense at trial. *Kolanek*, 491 Mich at 412-413, citing *People v Reed*, 294 Mich App 78, 86; 819 NW2d 3 (2011) and *Anderson*, 293 Mich App at 65 (M. J. KELLY, J., concurring). However, the trial court erred when it determined that the provisions of § 4 applied to the affirmative defense stated under § 8. *Kolanek*, 491 Mich at 403. Hence, Anderson did not have to prove that his plants were kept in an enclosed, locked facility. See 333.26424(a). For the same reason, the trial court erred to the extent that it determined that the amounts stated under § 4 altered Anderson's burden of proof under § 8. The trial court also erred by assessing the weight and credibility to be given Anderson's evidence and by resolving any factual disputes. *Kolanek*, 491 Mich at 411. The trial court's sole function at the hearing was to assess the evidence to determine whether, as a matter of law, Anderson presented sufficient evidence to establish a prima facie defense under § 8 and, if he did, whether

there were any material factual disputes on the elements of that defense that must be resolved by the jury. *Id.* at 412-413.

Having concluded that the trial court erred,[2] we nevertheless decline to review de novo the evidence presented at the hearing to determine whether Anderson established his defense. It is clear that both Anderson's lawyer and the prosecutor presented their proofs on the mistaken assumption that the trial court had the authority to assess the weight and credibility of the evidence and make findings of fact. This mistaken assumption likely affected the parties' decisions in preparing and presenting their cases to the trial court at the hearing. In addition, although the issue of expert testimony came up at the evidentiary hearing, the trial court's rulings on that issue were not clear; it did not directly rule on the evidentiary matters—matters that are traditionally committed to the discretion of the trial court—and on whether it was necessary for either party to support or contest a particular element with expert testimony. The parties, for that reason, did not have an adequate opportunity to offer testimony on the various witnesses' expert qualifications, if any. Given the limited value of the existing record, we elect to exercise our discretion to "grant further or different relief as the case may require," MCR 7.216(A)(7), and remand this case to the trial court for a new evidentiary hearing.

III. CONCLUSION

In the interests of justice and because we conclude that this Court will benefit from the development of a

[2] We, however, commend the trial court for its efforts on these difficult issues. The record shows that the trial court took care to ensure that the parties had a full and fair opportunity to present their positions on § 8 and thoughtfully examined and applied the provisions of the Medical Marihuana Act in reaching its decision.

full record in any future appeal, we vacate the trial court's August 2010 opinion and order denying Anderson's motion to dismiss and remand this matter to the trial court to conduct a new § 8 evidentiary hearing consistent with this opinion and our Supreme Court's decision in *Kolanek*.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ., concurred.

LOUTTS v LOUTTS

Docket No. 297427. Submitted March 7, 2012, at Lansing. Decided September 20, 2012, at 9:00 a.m. Leave to appeal denied, 493 Mich 968.

Georgii B. Loutts was granted a judgment of divorce from Irina V. Loutts in the Washtenaw Circuit Court, Family Division, Archie C. Brown, J. Defendant appealed, alleging that the court erred when it failed to award her attorney and expert fees pursuant to MCR 3.206(C)(2)(a) and imputed to plaintiff a yearly income of $130,000 for purposes of determining spousal support. Defendant also claimed that the amount of spousal support awarded was insufficient, the court erred by imputing to defendant an income of $40,000 for purposes of determining spousal support, and the court erred by prohibiting her from competing for three years with the business that the court awarded to plaintiff in the property distribution.

The Court of Appeals *held*:

1. The trial court's failure to address defendant's request for attorney and expert fees was, in light of her multiple requests, an abuse of discretion. Because defendant sufficiently demonstrated her inability to pay, the case must be remanded to the trial court for the court to address and decide defendant's request under MCR 3.206(C)(2)(a).

2. The statute governing spousal support, MCL 552.23(1), favors a case-by-case approach to determining spousal support. Courts must employ a case-by-case approach when determining whether "double-dipping," situations where a business or professional practice is valued by capitalizing its income, some or all of which is also treated as income for spousal support purposes, will achieve an outcome that is just and reasonable within the meaning of MCL 552.23(1). In this case the trial court determined that the value of a business may be used for the purpose of either property distribution or spousal support, but not both. The trial court erred by applying a bright-line test and failing to consider the specific facts and circumstances of the case. The case must be remanded to the trial court for a redetermination of spousal support, including a determination whether the equities in this case warrant utilizing

the value of the business awarded to plaintiff for purposes of both property division and spousal support.

3. The record supports the trial court's determinations regarding the factors to be considered when determining spousal support. The trial court did not clearly err by determining that neither party was responsible for the support of their adult son and that the parties were equally at fault for the breakdown of the marriage.

4. The trial court's determination that defendant was capable of earning $40,000 annually was purely speculative. The trial court abused its discretion by imputing to defendant an income of $40,000 for the purpose of determining spousal support. Because defendant admits that $34,000 is an appropriate amount of income to impute to her, the matter must be remanded to the trial court for it to recalculate spousal support imputing to defendant an income of $34,000.

5. Because both parties requested the noncompete restriction, the restriction in this case is upheld.

Affirmed in part, reversed in part, and remanded.

DONOFRIO, J., concurring, wrote separately to explain why the noncompete restriction was appropriate and necessary for an equitable distribution in the circumstances of this case. The restriction was equitable and necessary because without it defendant could have received her share of the value of the company and thereafter formed a competing company, thereby adversely affecting the value of plaintiff's property distribution. Considering the facts of this case, the restriction was fair and just and was necessary for an equitable distribution of property. The restriction did not deprive defendant of her ability to earn a living and there was a legitimate concern that the value of plaintiff's property distribution would be destroyed without the restriction. The restriction was reasonable with regard to its duration and geographical scope. It was not overbroad and was appropriately narrowly tailored to protect plaintiff's property distribution.

DIVORCE — SPOUSAL SUPPORT.

The statute governing spousal support awards favors a case-by-case approach to determining spousal support and does not provide a strict formula to be followed; a trial court's decision to award spousal support is a discretionary decision that should reflect what is just and reasonable under the circumstances of the case; the parties are entitled to individual consideration based on the law and facts applicable to their case (MCL 552.23[1]).

Kline Legal Group, PLC (by *John K. Kline* and *Elizabeth A. Kitchen*), for plaintiff.

Faupel, Fraser & Fessler (by *Marian L. Faupel* and *James Fraser*) for defendant.

Before: RONAYNE KRAUSE, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM. Defendant appeals as of right a judgment of divorce following a bench trial. Because the trial court failed to address defendant's request for attorney and expert fees pursuant to MCR 3.206(C)(2)(a), erred by determining as a matter of law that the value of a business cannot be used for purposes of both property division and spousal support, abused its discretion by imputing to defendant an income of $40,000 for the purpose of determining spousal support, appropriately imposed a restriction prohibiting defendant from competing with the business that the trial court awarded to plaintiff in the property distribution, and made findings regarding fault and whether defendant was responsible for the support of their adult son that were not clearly erroneous, we affirm in part, reverse in part, and remand for further proceedings.

I. ATTORNEY AND EXPERT FEES

Defendant first argues that the trial court erred when it failed to award her attorney and expert fees pursuant to MCR 3.206(C)(2)(a). "Generally, an issue is not properly preserved if it is not raised before, addressed, *or* decided by the circuit court or administrative tribunal" and need not be addressed if first raised on appeal. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005) (emphasis added). We would have appreciated it if the trial court had ad-

dressed this issue,[1] but because it was raised there and is now being pursued on appeal, it is preserved for our review. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

We review a trial court's decision whether to award attorney fees for an abuse of discretion, the trial court's findings of fact for clear error, and any questions of law de novo. *Myland v Myland*, 290 Mich App 691, 701-702; 804 NW2d 124 (2010). However, " 'failure to exercise discretion when called on to do so constitutes an abdication and hence an abuse of discretion.' " *Rieth v Keeler*, 230 Mich App 346, 348; 583 NW2d 552 (1998), quoting *People v Stafford*, 434 Mich 125, 134 n 4; 450 NW2d 559 (1990).

MCR 3.206(C)(2)(a) provides:

> A party who requests attorney fees and expenses must allege facts sufficient to show that
>
> (a) the party is unable to bear the expense of the action, and that the other party is able to pay . . . .

"This Court has interpreted this rule to require an award of attorney fees in a divorce action 'only as necessary to enable a party to prosecute or defend a suit.' " *Myland*, 290 Mich App at 702, quoting *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003). "[A] party sufficiently demonstrates an inability to pay attorney fees when that party's yearly income is less than the amount owed in attorney fees." *Myland*, 290 Mich App at 702.

The trial court's failure to address defendant's request for attorney and expert fees under MCR 3.206(C)(2)(a) in

[1] Although the trial court addressed the parties' requests for attorney fees and sanctions premised on the other party's alleged wrongful conduct, the court did not address defendant's request for attorney and expert fees pursuant to MCR 3.206(C)(2)(a).

light of her multiple requests was an abuse of discretion. In *Myland*, 290 Mich App at 703, this Court held that the trial court erred as a matter of law by failing to consider "whether attorney fees were necessary for plaintiff to defend her suit, including whether, under the circumstances, plaintiff would have to invade the same spousal support assets she is relying on to live in order to pay her attorney fees and whether, under the specific circumstances, defendant has the ability to pay or contribute to plaintiff's fees." The trial court in the instant case similarly erred. The court failed to address defendant's request under MCR 3.206(C)(2)(a) by considering her ability to pay her fees relative to plaintiff's ability to pay. Moreover, defendant contends that her attorney fees alone total over $62,000, which is more than the amount of income that the trial court erroneously imputed to her.[2] Thus, she sufficiently demonstrated her inability to pay. *Myland*, 290 Mich App at 702. We therefore remand this case to the trial court for the court to address and decide defendant's request for attorney and expert fees under MCR 3.206(C)(2)(a).

II. SPOUSAL SUPPORT

Defendant next argues that the trial court erred by imputing to plaintiff a yearly income of $130,000 for the purpose of determining spousal support. It is within the trial court's discretion to award spousal support, and we review a spousal support award for an abuse of discretion. *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010); *Berger v Berger*, 277 Mich App 700, 726; 747 NW2d 336 (2008). We also review for an abuse of discretion a trial court's decision whether to impute

[2] As discussed later in this opinion, the trial court abused its discretion by imputing to defendant a yearly income of $40,000.

income to a party. *Carlson v Carlson*, 293 Mich App 203, 205; 809 NW2d 612 (2011). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Woodington*, 288 Mich App at 355. "The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished; spousal support is to be based on what is just and reasonable under the circumstances of the case." *Berger*, 277 Mich App at 726. We review for clear error the trial court's factual findings regarding spousal support. *Id.* at 727. A finding is clearly erroneous if, after reviewing the entire record, we are left with the definite and firm conviction that a mistake was made. *Woodington*, 288 Mich App at 355. If the trial court's findings are not clearly erroneous, we must determine whether the dispositional ruling was fair and equitable under the circumstances of the case. *Berger*, 277 Mich App at 727. We must affirm the trial court's dispositional ruling unless we are convinced that it was inequitable. *Id.*

Defendant contends that the trial court erred by imputing to plaintiff a yearly income of $130,000 for the purpose of calculating spousal support instead of basing the calculation on plaintiff's $240,000 yearly salary from QPhotonics, LLC, a company that plaintiff formed in 2000 and at which he began working full time in 2004. Plaintiff, on the other hand, argues that the trial court's decision to base spousal support on the lesser amount was appropriate to avoid a "double-dip" because the court awarded defendant one-half of the value of QPhotonics when it divided the parties' marital assets.

" 'Double dipping'—or 'tapping the same dollars twice'—refers to situations where a business or professional practice is valued by capitalizing its income, some or all of which is also treated as income for spousal

support purposes." Cunningham, "*Double dipping*" *revisited*: *Food for thought*, 27 Mich Fam L J, p 6 (January 1999).

> When the main value of a business (such as a service business or professional practice) is goodwill derived from its ability to generate future income, the appraisal typically involves determining the reasonable compensation of the owner, that is, what the owner would earn working for someone else if he or she did not own the business. The extra income (sometimes called excess compensation) earned over and above that reasonable compensation represents the investment return of the business and is an important element in the value of the business. To the extent that a nonowner spouse shares in excess compensation that was rolled into the value of the business, some practitioners argue that this same income should be excluded from consideration in support calculations because to include it would amount to a double dip by awarding a share of that excess compensation as part of the property division, and then another share of the same income stream as part of a support award. [2 Kelly, Curtis & Roane, Michigan Family Law (7th ed) (ICLE, 2011), § 15.40, p 15-46.]

In this case, the trial court determined that the value of QPhotonics was $280,000. The court awarded the company to plaintiff and awarded defendant $140,000, or one-half of the value of the company. The trial court then addressed spousal support, stating, in relevant part:

> [T]he critical issue for the Court is what income will be used by the parties in calculating support. The issue is whether -- and the primary issue here is what the Court has deemed and has been referred to as the double-dip. The issue is whether the plaintiff's share of the business future profits, that being the value of the company, in this case, the $280,000, can be used for both division of the marital assets, as the Court has now just done, and for calculation of spousal support.

* * *

> The Court has been cited to, has read and agrees with plaintiff's argument that the holding of the court in Heller v Heller [2008-Ohio-3296 (Ohio App, 2008) (*Heller I*)], a 2008 case, that that rationale, that awarding part of the same asset twice, results in an unequal property division. So, for purpose of the record, the Court in Heller determined this double-dipping in the context of spousal support and talks in part about -- and distinguishes the issue of pensions, which I believe should be distinguished, but then goes on to talk about that the Heller case used the capitalization of earnings method, that which was used in this case, in determining the value of the S corporation, again, like QPhotonics, at issue in this case, which the court indicated effectively and appropriately kept the concepts of defendant's salary and ownership profits separately.
>
> * * *
>
> I believe the court in Heller, which our Court of Appeals, for whatever reason, has, at least at this point, failed to undertake, clearly identifies what the issue is, and for purposes of fairness and being equitable, identifies that the determination of whether or not the valuation of the business is either for purpose of distribution of property or spousal support and not both. In this case, given that it's been for business purpose, for the utilization of that amount, then, for purpose of spousal support, at least short-term, if not for the entirety of spousal support, would be unfair.
>
> Therefore, this Court determines that the income of the plaintiff to be utilized for calculating spousal support purposes is $130,000.[3]

This Court has previously addressed double-dipping in the context of pensions. In *McCallister v McCallister*, 205 Mich App 84; 517 NW2d 268 (1994), the trial court awarded the defendant wife a portion of the value of the

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[3] This figure is consistent with the testimony of plaintiff's expert, Gary Rogow, who testified that $130,000 is the fair market value of plaintiff's compensation.

plaintiff husband's pension when it divided the couple's marital assets. The court awarded the plaintiff the pension plan itself, free of any claim of interest by the defendant. *Id.* at 89 (REILLY, P.J., concurring). After the plaintiff retired and began collecting pension benefits, he sought to modify his spousal support obligation, arguing that it was improper to consider his retirement income, derived from the pension plan awarded to him in the divorce judgment, when determining his ability to pay spousal support. *Id.* at 86. This Court disagreed and determined that MCL 552.23[4] and MCL 552.28 require courts to consider "*all* the circumstances of the case" "and empower courts to award [spousal support] out of the property of the former spouse when circumstances warrant it." *Id.* at 87-88; see also *Stoltman v Stoltman*, 170 Mich App 653, 658; 429 NW2d 220 (1988) ("[w]hether to terminate alimony upon the retirement of the party obligated to pay alimony when a pension has been awarded to the obligor should be decided on a case-by-case basis.").

As discussed in *McCallister*, Michigan's statute governing spousal support favors a case-by-case approach to determining spousal support. MCL 552.23(1) provides:

> Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reason-

[4] Although the *McCallister* Court recited the correct language, it erroneously cited MCL 522.23 instead of MCL 552.23. *McCallister*, 205 Mich App at 87.

> able, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

Thus, a trial court's decision to award spousal support is discretionary and should reflect "what is 'just and reasonable under the circumstances of the case.' " *Myland*, 290 Mich App at 695, quoting *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). "[P]arties to a divorce action are entitled to individual consideration based on the law and facts applicable to their case . . . ." *Myland*, 290 Mich App at 697 (quotation marks and citation omitted). Spousal support does not follow a strict formula. Indeed, "given the statutory mandate of MCL 552.23 . . . there is no room for the application of any rigid and arbitrary formulas when determining the appropriate amount of spousal support . . . ." *Id.* at 699-700. Accordingly, we decline to adopt a bright-line rule with respect to "excess" income and hold that courts must employ a case-by-case approach when determining whether "double-dipping" will achieve an outcome that is just and reasonable within the meaning of MCL 552.23(1).[5]

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[5] In addition, we note that the trial court's reliance on *Heller* was misplaced. In a subsequent appeal in *Heller*, the appellate court stated that its determination that a double-dip was inequitable was based on the facts of that case alone and was not a determination that double-dipping is never permissible:

> In the first appeal, there was no language in our decision to suggest that this court intended to promulgate a flat prohibition against double dipping applicable to every income-producing asset; rather, this court addressed the "double dip" issue only as it applies to the facts of this case. [*Heller v Heller*, 2010-Ohio-6124, ¶ 8 (Ohio App, 2010) (*Heller II*).]

Moreover, the *Heller I* court's determination that double-dipping was inappropriate was based in part on the defendant's argument that the double-dip resulted in a violation of an Ohio statute requiring that the division of marital property be "equal" or that the court make specific

In this case, the trial court, relying on *Heller I*, determined that the value of a business may be used for the purpose of *either* property distribution *or* spousal support, but not both. For the reasons discussed, the trial court erred by applying a bright-line test and failing to consider the specific facts and circumstances of this case. Accordingly, we direct the trial court to redetermine spousal support on remand, including whether the equities in this case warrant utilizing the value of QPhotonics for purposes of both property division and spousal support.

Defendant also argues that the trial court's spousal support award of $1,510 a month for four years was insufficient. Specifically, she contends that that amount was inappropriate considering that the parties were married for 21½ years, their income disparity was significant, she was responsible for supporting the parties' adult son, and plaintiff was at fault for the breakdown of the marriage. In deciding whether to award spousal support, the trial court should consider several factors, including

> "(1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity." [*Myland*, 290 Mich App at 695, quoting *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).]

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findings of fact supporting an unequal division of property. *Heller I*, 2008-Ohio-3296, ¶¶ 6-7. This requirement is not present in Michigan law.

"The trial court should make specific factual findings regarding the factors that are relevant to the particular case." *Korth v Korth*, 256 Mich App 286, 289; 662 NW2d 111 (2003). The primary purpose of spousal support is to balance the parties' incomes and needs so that neither party will be impoverished, and spousal support must be based on what is just and reasonable considering the circumstances of the case. *Id*.

The record supports the trial court's factual findings regarding the spousal support factors. In particular, no evidence indicated that the parties' adult son, Andrei, was unable to work because of mental and physical health issues, as defendant maintained. Although defendant observed Andrei walking with a cane on one occasion, no evidence was presented of any restriction on his ability to work. The trial court considered the conflicting testimony regarding Andrei, noted the differences in the testimony, and indicated how it reached its decision. The court's determination that neither party was responsible for supporting Andrei was not clearly erroneous.

In addition, the trial court's determination that the parties were equally at fault for the breakdown of the marriage was not clearly erroneous. The trial court correctly noted that the fact that defendant obtained a personal protection order against plaintiff did not "automatically import a finding of domestic violence." In fact, the trial court acknowledged that the first domestic violence charge against plaintiff was dismissed and plaintiff was acquitted of the second charge. Defendant also argues that plaintiff repeatedly moved the family from state to state and out of the country. As the trial court noted, however, even if defendant was not in favor of the moves, she nevertheless participated in them and remained in the marriage. The majority of defendant's

argument amounts to frustration that the trial court viewed and weighed the evidence differently than she did. That does not, however, make the court's determinations erroneous. Because the record supports the trial court's factual determination regarding fault, it was not clearly erroneous.

Defendant further argues that the trial court erred by imputing to her an income of $40,000 for the purpose of determining spousal support. There is no question that defendant has the education and skills to find employment. It is equally clear from the record, however, that she has a minimal employment history, with almost no work in the field of her degree. The trial court relied on the testimony of Robert Ancell, an expert witness offered by plaintiff, in determining the amount of income to impute to defendant. Ancell testified that he researched higher education job postings in the United States and discovered 102 job postings in defendant's field of political science. Ancell further testified that a Villanova University job posting was seeking someone with special expertise in Russian affairs. The trial court relied heavily on Ancell's testimony and opined that the Villanova job "appeared to be almost made for" defendant. The Villanova job posting, however, did not indicate a salary, and none of the "available" jobs about which Ancell testified was located in Michigan. In fact, no evidence was presented of a specific job for which defendant was qualified that paid at least $40,000 a year. Moreover, Ancell testified that a personal interview with defendant would be necessary to determine whether she was a suitable match for a particular job. Defendant denied that she would be able to earn $40,000 right away and testified that she might have to work part time or as an adjunct professor making $10,000 to $15,000 a year before she would be able to find full-time employment.

Given this evidence, the trial court's determination that defendant was capable of earning $40,000 annually was purely speculative. Accordingly, the trial court abused its discretion by imputing to defendant an income of $40,000 for the purpose of determining spousal support. See *Carlson*, 293 Mich App at 205. Defendant argues that the trial court erred by imputing to her an income greater than $34,000, which is the amount that she argued in the trial court could properly be imputed to her. Because defendant admits that $34,000 is an appropriate amount of income to impute to her, we direct the trial court on remand to recalculate spousal support, imputing to defendant an income of $34,000.[6]

III. NONCOMPETE RESTRICTION

Defendant next argues that the trial court erred by prohibiting her from competing with QPhotonics for a period of three years. The judgment of divorce provided:

> **RESTRAINING ORDER ON DEFENDANT'S ACTIONS FOR 3 YEARS**
>
> The Court orders that Defendant, Irina V. Loutts, shall [be] restrained from the following actions or conduct for three years from the date of the entry of this Judgment, under penalties of contempt of Court for any violations:
>
> (1) Defendant shall not communicate with QPhotonics, LLC's employees or hire any of QPhotonics, LLC's employees;
>
> (2) Defendant shall not engage in or obtain a website that will sell the same or similar products as QPhotonics, LLC.[;]

[6] We note that although the trial court awarded defendant spousal support retroactive to the court's earlier temporary support order, defendant does not challenge the retroactivity of the award.

> (3) Defendant shall not communicate with QPhotonics, LLC's Suppliers or Customers;
>
> (4) Defendant shall not in anyway [sic] compete with QPhotonics, LLC. in regards to the following products / items:
>
> Laser diodes; Superluminescent diodes; light emitting diodes; semiconductor optical amplifiers; Photodiodes; Laser Diode Controllers; Temperature controls for laser diodes; Laser diode mounts, wafers and / or chips.
>
> Such Restraining Order shall be in all International Markets and not limited to the U.S.A. market.

Defendant argues that this prohibition contravenes the general public policy against the restraint of trade and is overbroad.

> A court possesses inherent authority to enforce its own directives. A divorce case is equitable in nature, and a court of equity molds its relief according to the character of the case; once a court of equity acquires jurisdiction, it will do what is necessary to accord complete equity and to conclude the controversy. [*Draggoo v Draggoo*, 223 Mich App 415, 428; 566 NW2d 642 (1997) (quotation marks and citations omitted).]

"The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances." *Gates*, 256 Mich App at 423. Factors to consider when dividing marital property include "general principles of equity." *Sparks v Sparks*, 440 Mich 141, 160; 485 NW2d 893 (1992). A trial court's disposition in a divorce action must be "fair and just." *Id*. at 150. We will not reverse a trial court's dispositional ruling unless we are left with a firm conviction that the property division was inequitable. *Gates*, 256 Mich App at 423.

Under these facts, we would uphold the noncompete restriction on the sole basis that both parties requested

it. It is unfair to harbor error and use it as an appellate parachute. Again because both parties made the request, to be awarded the same company and issue a noncompete restriction against the other spouse, we uphold the noncompete restriction in this case.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction. Neither party having prevailed in full, we decline to award costs pursuant to MCR 7.219.

RONAYNE KRAUSE, P.J., and FORT HOOD, J., concurred.

DONOFRIO, J. (*concurring*). I concur in the majority opinion affirming in part, reversing in part, and remanding this case for further proceedings. I write separately to explain why the noncompete restriction was necessary for an equitable property distribution in the circumstances of this case.

The provision in the judgment of divorce prohibiting defendant from competing with QPhotonics, LLC, was part and parcel of the trial court's awarding defendant one-half of the value of the company. The restriction was equitable because without it defendant could have received her share of the value of QPhotonics and thereafter formed a company to compete with QPhotonics, thereby adversely affecting the value of plaintiff's property distribution. In fact, the record shows that the noncompete restriction was necessary. Defendant testified that while she had no plans to start a business that competed with QPhotonics, she did plan to start a "complementary" business that uses certain diodes or other products that QPhotonics sells. Defendant further testified that she had already traveled to Russia to meet with two suppliers regarding her business plan. The trial court appropriately

determined that "the line between what is a competing business versus a complementary business is blurred at best[,]" and that, accordingly, "plaintiff is entitled to some form of protection from a business competing with QPhotonics . . . ." The trial court expressed concern that defendant could receive her one-half share of the value of QPhotonics and then create a competing business that would reduce the value of the company and dilute plaintiff's property distribution. Moreover, the record shows that defendant had the ability to compete directly with QPhotonics. Defendant's father was an expert in the area of fiber optics and two of his former students are also experts in the field and work at Wayne State University. Defendant also testified that she has two friends who are physicists and work for the University of Michigan, one of whom had volunteered to assist defendant. Therefore, considering the facts of this case, the noncompete restriction was fair and just and was necessary for an equitable distribution of property.

This case does not present a scenario involving like professionals engaged in a service-oriented business. For example, if two doctors married, formed a medical practice specializing in one area of medicine, and then divorced, a noncompete restriction prohibiting one of the doctors from competing with the other would deprive that person of his or her ability to earn a living. That is not the situation presented in this case where plaintiff formed QPhotonics and operated the business. Unlike plaintiff, defendant was not educated in physics and worked for the business only in the capacity of an accountant or bookkeeper. Notwithstanding defendant's lack of education and training in physics, she nevertheless had the ability to compete directly with QPhotonics, as previously discussed, considering that her father and acquaintances worked in the field and

were able to assist her. Moreover, defendant indicated her intent to form her own business in the industry. Thus, the facts of this case presented a situation where a noncompete restriction did not deprive defendant of her ability to earn a living and there was a legitimate concern that the value of plaintiff's property distribution would be destroyed without the restriction.

Further, the noncompete restriction was reasonable. In an analogous situation, MCL 445.774a(1) "explicitly permits reasonable noncompetition agreements between employers and employees." *Bristol Window & Door, Inc v Hoogenstyn*, 250 Mich App 478, 494; 650 NW2d 670 (2002). That statute provides:

> An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is *reasonable as to its duration, geographical area, and the type of employment or line of business*. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited. [Emphasis added.]

"Thus, a restrictive covenant must protect an employer's reasonable competitive business interests, but its protection in terms of duration, geographical scope, and the type of employment or line of business must be reasonable." *St Clair Med, PC v Borgiel*, 270 Mich App 260, 266; 715 NW2d 914 (2006).

Here, the duration of the restriction is reasonable. The restriction was implemented on the date that the trial court entered the judgment of divorce and will be in effect for three years. Thus, it will expire on March 9, 2013. In *Follmer, Rudzewicz & Co, PC v Kosco*, 420

Mich 394, 398 n 1; 362 NW2d 676 (1984), and its companion case, *Nolta-Quail-Sauer & Assoc v Roche*, our Supreme Court upheld noncompete agreements lasting three and five years, respectively. In addition, this Court has upheld an agreement requiring no contact or solicitation for a period of two years. *Rehmann, Robson & Co v McMahan*, 187 Mich App 36, 41-42; 466 NW2d 325 (1991). Under the circumstances of this case, three years is not an unreasonable length for the duration of the restriction.

The geographical area of the restriction is also reasonable. QPhotonics is an Internet business that conducts the majority of its business in the global market through its website and delivers products worldwide. Thus, the restriction appropriately prohibits defendant from competing with QPhotonics in the global market. See *Superior Consulting Co, Inc v Walling*, 851 F Supp 839, 847 (ED Mich, 1994) (an unlimited geographic scope of a restrictive covenant is reasonable if the employer operates on a worldwide basis).

Further, the noncompete restriction is not unreasonable with respect to the type of employment or line of business. The restriction is not overbroad. It neither prevents defendant from working with all lasers in any manner nor does it prevent her from starting a complimentary business. The trial court did not decide what a complementary business, as opposed to a competing business, would entail and left that issue to be decided at a later time, if necessary. In addition, the prohibition against speaking to or hiring QPhotonics employees is limited because, other than plaintiff, there are only three QPhotonics employees, a bookkeeper and two test engineers. The prohibition against communicating with QPhotonics's suppliers and customers is also reasonable. Moreover, the restriction is limited to specific laser

items and components, and plaintiff testified that he had no objection to defendant's selling systems that include the component parts that QPhotonics sells. Rather, he maintained that defendant should not be permitted to sell the same components and thus directly compete with QPhotonics. Accordingly, nothing in the restriction prevents defendant from working with lasers, working as a bookkeeper at a company that works with lasers, or utilizing whatever knowledge she has of lasers to manufacture and sell systems that incorporate laser components. Therefore, the noncompete restriction is not overbroad and is narrowly tailored to protect plaintiff's property distribution. Because the imposition of the restriction was within the trial court's equitable authority and was necessary to an equitable property distribution considering the particular facts of this case, I would uphold the restriction on those grounds.

TOLL NORTHVILLE LIMITED PARTNERSHIP v NORTHVILLE TOWNSHIP (ON REMAND)

Docket No. 301043. Submitted July 26, 2012, at Lansing. Decided September 25, 2012, at 9:00 a.m.

Toll Northville Limited Partnership (Toll) installed road access, streetlights, sidewalks, and utility services for a residential development project in Northville Township owned by Biltmore Wineman LLC (Biltmore). Because of the improvements, the township increased the tax assessments on the property pursuant to MCL 211.34d(1)(b)(*viii*), which defined public-service improvements as additions for which a property's taxable value may be adjusted under Proposal A. Toll and Biltmore did not timely challenge the increase in 2000, but did contest the assessments in the Tax Tribunal the next year after the property was divided into smaller parcels. Toll and Biltmore also brought an action for a declaratory judgment against the township in the Wayne Circuit Court, challenging the validity of MCL 211.34d(1)(b)(*viii*). The court, John A. Murphy, J., ruled that MCL 211.34d(1)(b)(*viii*) was unconstitutional. The Court of Appeals, WHITBECK, C.J., and HOEKSTRA and WILDER, JJ., affirmed this ruling, 272 Mich App 352 (2006), as did the Supreme Court, 480 Mich 6 (2008). In the Tax Tribunal proceeding, which had been stayed pending the declaratory-judgment action, Toll and Biltmore argued that in light of the Supreme Court's ruling, the value of the public-service improvements had to be removed from the assessments. The Tax Tribunal concluded that it lacked jurisdiction to amend the taxable value of the original parcel, which had been assessed in a year not under appeal, but nevertheless amended the taxable values of the divided properties to exclude the value of the public-service improvements in order to conform to the Supreme Court's decision. The township appealed. After consolidating the case with two others, the Court of Appeals, MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ., reversed the Tax Tribunal's order, holding that because the tribunal lacked jurisdiction to review a previous year's taxable value for purposes of determining a timely appealed current year's taxable value, the tribunal had erred by amending the values. The Court of Appeals ordered the Tax Tribunal to affirm the subject properties' taxable values as originally assessed by the township, including the

unconstitutional additions for public-service improvements. *MJC/Lotus Group v Brownstown Twp*, 293 Mich App 1 (2011). The Supreme Court granted Toll and Biltmore's application for leave to appeal, limited to whether the Tax Tribunal had jurisdiction to reduce an unconstitutional increase in the taxable value of property if the improperly increased taxable value was not challenged in the year of the increase. 490 Mich 877 (2011). The Supreme Court held that once the tribunal's jurisdiction is properly invoked, it has the authority to adjust an erroneously assessed taxable value in a subsequent year in order to bring the current tax rolls into compliance with the General Property Tax Act, MCL 211.1 *et seq*., reversing the judgment of the Court of Appeals. *Mich Props, LLC v Meridian Twp*, 491 Mich 518 (2012). The Supreme Court remanded the case to the Court of Appeals for consideration of the township's remaining issues on appeal regarding the tribunal's valuation of the subject properties.

On remand, the Court of Appeals *held*:

When parties agree to submit a case on stipulated facts, courts generally accept those facts as conclusive. In this case, the parties had stipulated to the cash values of the properties, but the tribunal's valuation of the properties did not comport with the parties' stipulation. The case had to be remanded for correction of the error.

Reversed and remanded.

TAXATION — REAL PROPERTY — TAXABLE VALUE — EVIDENCE — STIPULATED FACTS.

When parties agree to submit a case on stipulated facts, courts generally accept those facts as conclusive.

Hoffert & Associates, P.C. (by *Myles B. Hoffert* and *David B. Marmon*), for Toll Northville Limited Partnership and Biltmore Wineman LLC.

Hafeli Staran Hallahan & Christ, P.C. (by *Laura M. Hallahan* and *Amy K. Driscoll*), and *Rose & Abramson, P.C.* (by *Nevin A. Rose*), for Northville Township.

Amici Curiae:

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C. (by *Robert E. Thall*), for the Michigan Townships Association.

McClelland & Anderson, L.L.P. (by *Gregory L. McClelland* and *Melissa A. Hagen*), for the Michigan Association of Realtors and the Michigan Association of Home Builders.

ON REMAND

Before: MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ.

PER CURIAM. This case returns from our Supreme Court for consideration of an issue that was not addressed when the case was previously before this Court. Respondent, Northville Township (Northville), appeals as of right Tax Tribunal member Victoria L. Enyart's October 19, 2010, opinion and judgment, which adjusted the taxable values of properties owned by petitioners Toll Northville Limited Partnership (Toll) and Biltmore Wineman, LLC (Biltmore) for the 2001 and 2002 tax years.

Our Supreme Court set forth the relevant facts in this case, which it decided as a companion case to *Mich Props, LLC v Meridian Twp*, 491 Mich 518; 817 NW2d 548 (2012):

> The underlying factual basis for the dispute between Toll Northville Limited Partnership and Northville Township began in 2000 when Toll, a residential developer, installed public-service improvements to a "parent" parcel that was to be divided into residential "child" parcels. The value of the public-service improvements, which were legally defined as "additions" pursuant to MCL 211.34d(1)(b)(*viii*), was included in the taxable value for the parent parcel for tax year 2000, thereby substantially increasing the taxable value of Toll's property. Toll did not timely challenge the increase in taxable value for tax year 2000, and the parent parcel was divided into child parcels by tax year 2001. For 2001, the assessor proportionately split the addition to the taxable values among the resulting

> child parcels, so that each child parcel carried its portion of the addition of the value of the public-service improvements to the taxable value that had previously been assessed to the parent parcel.
>
> Toll timely appealed the taxable values of the child parcels for tax year 2001 in the Tax Tribunal. Also, Toll filed a declaratory action in the circuit court to have MCL 211.34d(1)(b)(*viii*), the basis for including public-service improvements as "additions," declared unconstitutional. The Tax Tribunal held Toll's tribunal case in abeyance pending the outcome of the circuit court action. Toll was successful in its circuit court action, culminating in an opinion from this Court that unanimously declared MCL 211.34d(1)(b)(*viii*) unconstitutional.
>
> Following this Court's decision, the Tax Tribunal proceedings were reopened. The tribunal concluded that it lacked jurisdiction to amend the taxable value of the parent parcel for tax year 2000 because that value was not timely appealed. However, the tribunal prospectively amended the taxable value of the properties at issue to conform to this Court's decision. Thus, the tribunal removed the value of the public-service improvement additions from the parcels' taxable values for tax year 2001 and subsequent years. [*Mich Props*, 491 Mich at 538-539.]

Northville appealed, arguing that the Tax Tribunal had erred as a matter of law by reviewing the accuracy of the 2000 taxable-value determinations and by reducing the 2001 taxable values by the amount of the public-service additions. Northville also contended that the Tax Tribunal had lacked jurisdiction to alter the 2000 taxable values and alleged error based on principles of collateral estoppel, res judicata, and the law of the case. Lastly, Northville argued that the Tax Tribunal had erred by ignoring a stipulation of the parties regarding the true cash values of the parcels. This Court consolidated this appeal with appeals in *MJC/Lotus Group v Brownstown Township* (Docket No. 295732) and *CW Development LLC/Meadow Walk v*

Grand Blanc Township (Docket No. 296499). *Toll Northville Ltd Partnership v Northville Twp*, unpublished order of the Court of Appeals, entered February 9, 2011 (Docket No. 301043).

On May 31, 2011, this Court issued a published opinion reversing the Tax Tribunal's decision and holding that the Tax Tribunal did not have authority to indirectly review and revise a previous year's taxable value for purposes of determining a timely appealed current year's taxable value. *MJC/Lotus Group v Brownstown Twp*, 293 Mich App 1, 5; 809 NW2d 605 (2011), rev'd *Mich Props*, 491 Mich 518. We ordered the Tax Tribunal to affirm the subject properties' taxable values as originally assessed by Northville. *MJC/Lotus Group*, 293 Mich App at 16.

Toll and Biltmore sought leave to appeal in our Supreme Court. The Court granted leave, "limited to the issue whether the Court of Appeals correctly held that the Michigan Tax Tribunal had no jurisdiction to reduce an unconstitutional increase in the taxable value of property if the improperly increased taxable value was not challenged in the year of the increase." *Toll Northville Ltd Partnership v Northville Twp*, 490 Mich 877 (2011).

On June 14, 2012, the Supreme Court reversed this Court's decision, holding that the Tax Tribunal has the authority and the duty to correct errors in previous years' taxable values:

> In *Toll Northville*, we hold that the Tax Tribunal does have the authority to reduce an unconstitutional previous increase in taxable value for purposes of adjusting a taxable value that was timely challenged in a subsequent year. The Tax Tribunal Act sets forth the Tax Tribunal's jurisdiction. Once its jurisdiction is properly invoked, the Tax Tribunal possesses the same powers and duties assigned to a March board of review under the [General Property Tax Act (GPTA), MCL 211.1 *et seq*.], including the duty to adjust erroneous

> taxable values to bring the current tax rolls into compliance with the GPTA. [*Mich Props*, 491 Mich at 545-546.]

The Supreme Court remanded the case for this Court to consider "Northville's alternative argument that the adjusted valuation set by the Tax Tribunal did not comport with a stipulation by the parties regarding the valuation." *Id*. at 540 n 39.[1]

Northville argues that the Tax Tribunal erred in its calculation of many of the properties' taxable values because it failed to account for the values of new construction additions made to 58 of the 353 lots in 2000. Northville relies on a stipulation by the parties regarding the values of the additions. Northville also maintains that the addendum to the Tax Tribunal's opinion and judgment reflects only nine additions, and five of the values ascribed to those additions are not the values to which the parties stipulated. Northville argues that these errors in the computation of the 2001

[1] We interpret the scope of this remand to include only the fourth issue raised on appeal by Northville, which alleges error in the calculation of taxable values because of the tribunal's failure to account for values to which the parties had stipulated. The Supreme Court directed this Court to consider "the Tax Tribunal's valuation of the subject properties." *Mich Props*, 491 Mich at 546. Although Northville states its other issues in terms of valuation, those issues advance questions of law, i.e., collateral estoppel, res judicata, and law of the case. We note our Supreme Court's rejection of Northville's reliance on *Leahy v Orion Twp*, 269 Mich App 527; 711 NW2d 438 (2006) to support its collateral-estoppel claim, *Mich Props*, 491 Mich at 533 n 18, and Northville cites *Leahy* in support of its res judicata and law-of-the-case arguments as well. Moreover, the Supreme Court has held as a matter of law that the Tax Tribunal not only has "the authority to reduce an unconstitutional previous increase in taxable value for purposes of adjusting a taxable value that was timely challenged in a subsequent year," but also that the tribunal has a *duty* to do so. *Id.* at 545-546. The related concepts of collateral estoppel and res judicata, as well as the law-of-the-case doctrine, do not apply where, as here, our Supreme Court has recognized an affirmative duty to correct a previous determination of taxable values that later proves to be incorrect.

taxable values caused inaccuracies in the calculation of the 2002 taxable values as well.

Whether the Tax Tribunal disregarded a clear and unambiguous factual stipulation by the parties is a legal question, see *In re Nestorovski Estate*, 283 Mich App 177, 183; 769 NW2d 720 (2009), which this Court reviews de novo. *Schwass v Riverton Twp*, 290 Mich App 220, 222; 800 NW2d 758 (2010). "Where parties agree to submit a case on stipulated facts, courts generally accept those facts as conclusive." *Kaiser Optical Systems, Inc v Dep't of Treasury*, 254 Mich App 517, 520; 657 NW2d 813 (2002).

On the last day of the hearing, the parties informed the tribunal that they had stipulated to the cash values of the properties:

> *Ms.* [*Laura M.*] *Hallahan* [*counsel for Northville*]: I think if we can go through some preliminary matters on a couple items, the parties have stipulated to the true cash value of every parcel under appeal in this matter and we will be filing a stipulation. I think the only issues remaining for this Tribunal to decide is whether the taxable value was properly calculated during the splits and combination of the parcels and whether the TV added for public service improvements in a year not under appeal should now be removed for the years that are under appeal. We've gone through and stipulated to most of the exhibits that will be introduced here today. . . . [W]e'll just go through them and I'll identify each one.
>
> * * *
>
> . . . R-14 is the summary of the individual residential parcels, the parent-child split and tax year 2000-2001 taxable values. R-16 is the summary of the individual residential parcels for tax year 2001 and '02 taxable values. . . .
>
> * * *

> . . . All those documents or all those exhibits have been stipulated to.
>
> *Mr.* [*David B.*] *Marmon* [*counsel for Toll and Biltmore*]: That's correct. We stipulate to their admission.
>
> *Judge Enyart*: All right.

The register of actions indicates that a stipulation was filed after the hearing.

The Tax Tribunal's addendum to its opinion and judgment charts the relevant values for each parcel in the years 2001 and 2002. In the "2001 ADDITIONS" column, the values of additions are provided for only nine parcels. The column listing the 2001 additions in exhibit 14 includes values for more than 50 parcels. Additionally, five of the nine values of "2001 ADDITIONS" in the addendum are not consistent with the values in exhibit 14 to which the parties stipulated. For example, the tribunal's addendum indicates a value of $287,600 for the 2001 additions to parcel no. 77-059-01-0009-000. Northville's exhibit 14 indicates that the value is $13,600. The addendum lists the value of 2001 additions to parcel no. 77-059-01-0010-000 as zero, but exhibit 14 shows the value as $13,600. The 2001 additions to parcel no. 77-059-01-0012-000 were valued at $13,600 in the tribunal's addendum, but at zero according to exhibit 14. The addendum shows the value of additions for parcel no. 77-059-01-0013-000 as $13,600, contrary to the value of $22,700 listed on exhibit 14 for that parcel. The 2001 additions to parcel no. 77-059-01-0016-00 are valued at $328,900 on the addendum, but at zero on exhibit 14.

Toll and Biltmore do not dispute Northville's challenge to the valuations of the properties on the basis that the Tax Tribunal failed to honor the parties' stipulation.[2] And we presume that the omission of the

[2] Toll and Biltmore did not address this issue in their brief on appeal.

stipulated values from the addendum to the opinion and judgment was inadvertent. There is no indication in the record that the tribunal rejected the parties' stipulation. To the contrary, Judge Enyart was agreeable to the stipulation at the hearing and she referred to it in her opinion. Regardless of the reason for the omission, the tribunal's valuation of the properties does not comport with the parties' stipulation. Therefore, we reverse and remand for correction of this error.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ., concurred.

PEOPLE v BUIE (ON REMAND)

Docket No. 278732. Submitted July 3, 2012, at Lansing. Decided October 2, 2012, at 9:00 a.m. Leave to appeal denied, 494 Mich 854.

James Henry Buie was convicted by a jury in the Kent Circuit Court, Dennis B. Leiber, J., of two counts of first-degree criminal sexual conduct involving a victim under the age of 13, three counts of first-degree criminal sexual conduct involving the use of a weapon, and possession of a firearm during the commission of a felony. Defendant appealed, alleging in part that he was deprived of his constitutional right to confront the witnesses against him. The Court of Appeals, BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ., remanded the case to the trial court to determine whether the video-conferencing procedure used to present the testimony of a doctor and a DNA expert was necessary to further a public policy or state interest important enough to outweigh defendant's confrontation rights. 285 Mich App 401 (2009). Both parties sought leave to appeal in the Supreme Court, but both applications were denied, and the Supreme Court further instructed that the trial court was required to make findings regarding good cause and consent to the video-conferencing procedure pursuant to MCR 6.006(C). 485 Mich 1105 (2010). After remand, the Court of Appeals, BECKERING, P.J., and M. J. KELLY, J. (WHITBECK, J., concurring) reversed and remanded for a new trial, finding that the trial court had plainly erred by permitting witnesses to testify through two-way interactive video. 291 Mich App 259 (2011). The prosecutor sought leave to appeal in the Supreme Court, which reversed, concluding that defendant had waived his right to confrontation and that MCR 6.006 had not been violated. The Supreme Court then remanded the case to the Court of Appeals for consideration of defendant's remaining issues on appeal. 491 Mich 294 (2012).

On remand, the Court of Appeals *held*:

1. A defendant has the right to be present during voir dire. Only a defendant may waive his statutory and constitutional right to be present during his or her trial. Waiver occurs when the defendant intentionally, understandingly, and voluntarily relinquishes or abandons a known right. The waiver of the right to be

present cannot be presumed from a silent record. A defendant can waive the right to be present at trial by voluntarily being absent after the trial has begun or by being so disorderly or disruptive that his trial cannot be continued while he is present. Reversal was not required on the basis of defendant's temporary absence during voir dire. There was insufficient evidence to establish that defendant voluntarily waived his right to be present in the courtroom. While defendant requested to be excused from the courtroom during voir dire, there was insufficient evidence on the record to conclude that he had been informed of his constitutional right to be present. Defendant also did not waive his right to be present during voir dire proceedings by interrupting the process once and requesting to leave the courtroom. However, there was no reasonable possibility that defendant was prejudiced by his absence from the courtroom during voir dire for a short period of time. Reversal was not warranted because the evidence of defendant's guilt was overwhelming and there was no evidence that the alleged error seriously affected the fairness, integrity, or public reputation of judicial proceedings.

2. The Sixth Amendment right to counsel extends to all critical stages during a criminal prosecution where counsel's absence might harm a defendant's right to a fair trial. A total or complete deprivation of the right to counsel at a critical stage of a criminal proceeding is a structural error requiring automatic reversal. Effective assistance of counsel is presumed and ineffective assistance is established if a defendant proves that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Because defendant was represented by counsel at the preliminary examination and at sentencing, defendant cannot support a denial of the right to counsel claim on that basis. Defendant was also not denied the effective assistance of counsel. Defendant cannot allege that counsel was ineffective for failing to meet with him when defendant failed to cooperate with his counsel's staff during a visit. There was no evidence that defense counsel's performance fell below an objective standard of reasonableness because evidence demonstrated that defense counsel pursued a valid theory of defense, properly cross-examined all witnesses, and made appropriate objections to evidence. Defendant was also not denied the effective assistance of counsel at sentencing because he failed to specify what mitigating factors counsel should have presented at sentencing, evidence linking defendant to the crimes was overwhelming, and a challenge to the guidelines would have been futile.

3. A defendant is not entitled to have the attorney of his choice appointed simply by requesting the replacement of the attorney who was originally appointed. A defendant is entitled to substitution of appointed counsel only when discharge of the first attorney is for good cause and does not disrupt the judicial process. Good cause is determined on the basis of the individual facts of each case. A complete breakdown of the attorney-client relationship or disagreement over whether a particular line of defense should be pursued may justify appointing new counsel. However, reversal is not required on the basis of an allegation of attorney disinterest unless the record shows that the lawyer assigned to represent the defendant was in fact inattentive to his or her responsibilities. Substitution of counsel is not appropriate if the defendant deliberately caused the breakdown in the relationship by not cooperating with his counsel. The trial court did not abuse its discretion by failing to appoint substitute counsel because defendant failed to respond to defense counsel's staff when an interview was attempted. In addition, defendant was difficult to meet with because he was moved between facilities and defendant refused to attend a preliminary hearing.

4. MCL 768.27a allows the admission of evidence that a defendant charged with a sexual offense against a minor committed another sexual offense against a minor; however, under MRE 403 the probative value of such relevant evidence must not be substantially outweighed by the danger of unfair prejudice. Although not exhaustive, for purposes of determining whether to admit other-acts evidence under MCL 768.27a, the court may consider (1) whether the other acts and the charged crime were dissimilar, (2) whether the other acts and the charged crime occurred in temporal proximity, (3) whether the other acts occurred infrequently, (4) whether there were intervening acts, (5) whether the evidence supporting the occurrence of the other acts was not reliable, and (6) whether there was a lack of need for evidence beyond the complainant's and the defendant's testimony. The trial court did not abuse its discretion by admitting LB's testimony that defendant had previously been convicted of sexually assaulting her when she was 13 years old. The testimony established that defendant had a history of assaulting young girls, the manner in which the prior and charged assaults occurred was similar, the events occurred within a three-year time span, and the evidence of each crime was supported by DNA evidence that established defendant as the offender. The highly probative value of the evidence demonstrating defendant's propensity to attack young girls was not substantially outweighed by a danger of unfair prejudice.

5. MCL 768.27a does not violate the Ex Post Facto Clauses of the United States and Michigan Constitutions.

6. The prosecutor did not have to justify the admission of LB's testimony under MRE 404(b) because it was admissible under MCL 768.27a.

Affirmed.

1. CRIMINAL LAW — VOIR DIRE — PRESENCE OF DEFENDANT — WAIVER.

A defendant has the right to be present during voir dire; only a defendant may waive his statutory and constitutional right to be present during his or her trial; waiver occurs when the defendant intentionally, understandingly, and voluntarily relinquishes or abandons a known right; the waiver of the right to be present cannot be presumed from a silent record; a defendant can waive the right to be present at trial by voluntarily being absent after the trial has begun or by being so disorderly or disruptive that his trial cannot be continued while he is present.

2. CRIMINAL LAW — ATTORNEY AND CLIENT — COURT-APPOINTED COUNSEL — SUBSTITUTION OF COUNSEL — BREAKDOWN OF ATTORNEY-CLIENT RELATIONSHIP.

A defendant is not entitled to have the attorney of his choice appointed simply by requesting the replacement of the attorney who was originally appointed; a defendant is entitled to substitution of appointed counsel only when discharge of the first attorney is for good cause and does not disrupt the judicial process; good cause is determined on the basis of the individual facts of each case; a complete breakdown of the attorney-client relationship or disagreement over whether a particular line of defense should be pursued may justify appointing new counsel; reversal is not required on the basis of an allegation of attorney disinterest unless the record shows that the lawyer assigned to represent the defendant was in fact inattentive to his or her responsibilities; substitution of counsel is not appropriate if the defendant deliberately caused the breakdown in the relationship by not cooperating with his counsel.

3. CRIMINAL LAW — EVIDENCE — CRIMINAL SEXUAL CONDUCT — OTHER-ACTS EVIDENCE.

MCL 768.27a allows the admission of evidence that a defendant charged with a sexual offense against a minor committed another sexual offense against a minor; however, under MRE 403 the probative value of such relevant evidence must not be substantially outweighed by the danger of unfair prejudice; although not

> exhaustive, for purposes of determining whether to admit other-acts evidence under MCL 768.27a, the court may consider (1) whether the other acts and the charged crime were dissimilar, (2) whether the other acts and the charged crime occurred in temporal proximity, (3) whether the other acts occurred infrequently, (4) whether there were intervening acts, (5) whether the evidence supporting the occurrence of the other acts was not reliable, and (6) whether there was a lack of need for evidence beyond the complainant's and the defendant's testimony.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *Timothy K. McMorrow*, Chief Appellate Attorney, for the people.

State Appellate Defender (by *Jonathan R. Sacks*) for defendant.

ON REMAND

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM. This is the third time that defendant James Henry Buie's appeal is before this Court. A jury convicted defendant of two counts of first-degree criminal sexual conduct (CSC) involving a victim under the age of 13, MCL 750.520b(1)(a), three counts of first-degree criminal sexual conduct involving the use of a weapon, MCL 750.520b(1)(e), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant appealed his convictions, and in *People v Buie*, 285 Mich App 401, 418-419; 775 NW2d 817 (2009), we remanded to the trial court to determine whether the video-conferencing procedure used to present the testimony of a doctor and a DNA expert was necessary to further a public policy or state interest important enough to outweigh defendant's confrontation rights. In *People v Buie*, 485 Mich 1105, 1105-1106

(2010), our Supreme Court ordered that, in addition to the above determination, the trial court was required to make findings regarding good cause and consent to the video-conferencing procedure pursuant to MCR 6.006(C). After remand, in *People v Buie (After Remand)*, 291 Mich App 259, 274-276; 804 NW2d 790 (2011), we held that the trial court plainly erred by permitting witnesses to testify through two-way interactive video, warranting reversal and a new trial. However, in *People v Buie*, 491 Mich 294, 297; 817 NW2d 33 (2012), our Supreme Court reversed, concluding that defendant had waived his right to confrontation and that MCR 6.006(C) had not been violated. The Supreme Court then remanded this case to this Court for consideration of defendant's remaining issues on appeal. *Id.* at 320. Because we find that defendant's remaining issues on appeal lack merit, we affirm defendant's convictions.

I. BASIC FACTS

The underlying facts of this case are set forth in greater detail in our two prior opinions; however, we will briefly summarize them here. Defendant was convicted of sexually assaulting three females: BS and two minors (ages 13 and 9). BS invited defendant into the apartment where she was babysitting the two minors in hopes of trading sex for cocaine, but defendant produced a firearm during the event and sexually assaulted all three victims. Hours later, a physician examined the minor victims and concluded that they had suffered sexual trauma to their genitals. An employee with the Forensic Biology Unit of the State Police concluded that analysis of the DNA samples linked the evidence taken from the victims to defendant.

A jury convicted defendant as described above, and the trial court sentenced him as a fourth-offense ha-

bitual offender, MCL 769.12, to concurrent terms of life imprisonment for each CSC conviction and to a consecutive two-year term of imprisonment for the felony-firearm conviction.

II. ANALYSIS

A. DEFENDANT'S ABSENCE DURING PORTIONS OF VOIR DIRE

Defendant argues that he is entitled to a new trial because his constitutional and statutory rights to be present during his trial were violated when the court held a significant portion of voir dire outside his presence. We disagree.

At trial, defendant did not object to his absence from the courtroom during voir dire. Therefore, the issue is unpreserved. See *People v Carines*, 460 Mich 750, 761-765; 597 NW2d 130 (1999). We review for plain error "unpreserved claims of constitutional error." *Id.* at 764. To avoid forfeiture under the plain-error rule, three requirements must be met: (1) an error must have occurred, (2) the error must be plain, and (3) the error must have affected the defendant's substantial rights, which generally requires the defendant to show that the error affected the outcome of the lower-court proceedings. *Id*. at 763. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings' independent of the defendant's innocence." *Id*. at 763, citing *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

The Michigan Supreme Court has recognized that a defendant has a right to be present during voir dire. *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984). This Court has recognized that only "a defendant

may waive both his statutory and constitutional right to be present during his trial." *People v Montgomery*, 64 Mich App 101, 103; 235 NW2d 75 (1975). Waiver is defined as "the intentional relinquishment or abandonment of a known right." *Carines*, 460 Mich at 762 n 7 (quotation marks and citation omitted). A defendant can waive his right to be present by (1) voluntarily being absent after the trial has begun, *People v Swan*, 394 Mich 451, 452; 231 NW2d 651 (1975), or (2) being "so disorderly or disruptive that his trial cannot be continued while he is present," *Mallory*, 421 Mich at 248.

"It is not seriously questioned that a defendant has the power to waive *constitutional* rights, provided he does so intelligently, understandingly and voluntarily." *People v Brown*, 46 Mich App 592, 597; 208 NW2d 590, aff'd 393 Mich 174 (1973). "A valid waiver of a defendant's presence at trial consists of a specific knowledge of the constitutional right and an intentional decision to abandon the protection of the constitutional right." *People v. Woods*, 172 Mich App 476, 479; 432 NW2d 736 (1988); see also *People v Palmerton*, 200 Mich App 302, 303; 503 NW2d 663 (1993). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citation omitted).

Defendant argues that he did not waive his right to be present during voir dire when he said, "I don't want to set [sic] in here myself. I would like to be excused myself [sic]." Rather, defendant contends his statement "represented an unfortunate reaction and expression of frustration after the judge 'excused' a potential panelist, and the trial court questioned a panelist who initially said they could not be fair."

1. VOLUNTARY WAIVER OF RIGHT TO BE PRESENT AT TRIAL

The record establishes that defendant specifically asked to be excused from the courtroom. As such, it is reasonable to conclude that he voluntarily and intentionally wished to be absent from the voir dire in progress. The record is silent, however, as to whether he was ever specifically apprised of his constitutional right to be present. Therefore, a finding that defendant knowingly or understandingly waived the protection of his constitutional right cannot be made. See *Montgomery*, 64 Mich App at 103 (noting that this Court cannot presume that the defendant waived his constitutional right on the basis of a silent or sketchy record); *People v Thompson*, 52 Mich App 262, 267; 217 NW2d 63 (1974) (stating that waiver of the right to be present cannot be presumed from a silent record).

2. GROUNDS FOR REMOVAL FROM COURTROOM

This Court has recognized that it is within the trial court's discretion to remove a defendant from the courtroom if the defendant's behavior is disruptive. *People v Harris*, 80 Mich App 228, 229-230; 263 NW2d 40 (1977). In *Harris*, the defendant had "repeatedly interrupted the trial with his willful and disorderly behavior, making it impossible to carry on the proceedings in his presence." *Id.* at 230. The trial court had warned the defendant that he would be removed from the courtroom if the behavior continued. *Id.* Once the defendant was removed, the trial court had offered him the opportunity to return if he would behave appropriately. *Id.* The defendant refused, and this Court ultimately concluded on review that "the trial court acted within the proper scope of discretion in removing defendant from the proceedings." *Id.*

The record in this case indicates that defendant interrupted voir dire once before he asked to leave and was removed from the courtroom. Although he had a prior history of acting out and disrupting the proceedings as evidenced during his second preliminary examination,[1] defendant's conduct during voir dire was not repeatedly disruptive, and he was not continually warned by the court to modify his behavior to avoid removal, as occurred in *Harris*, 80 Mich App at 230. Defendant's one outspoken moment, by itself, does not justify removal from the courtroom. See *id.* Thus, we conclude that defendant did not waive his right to be present by interrupting the voir dire proceedings. See *id*.

3. PREJUDICE ARISING FROM DEFENDANT'S TEMPORARY ABSENCE FROM THE TRIAL

"[T]he test for whether defendant's absence from a part of his trial requires reversal of his conviction is whether there was any reasonable possibility that defendant was prejudiced by his absence." *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995). The Michigan Supreme Court has also held that "it is no longer the law that injury is conclusively presumed from defendant's every absence during the course of a trial."

[1] Defendant was extremely disruptive during the second preliminary-examination hearing when he continually interrupted the trial court. Defendant was asked repeatedly to be quiet. However, defendant refused to comply, and the trial court warned defendant that he would be removed from the courtroom. Despite this warning, defendant continued to be disruptive and refused to be quiet while a witness was testifying. The trial court attempted to carry on despite these interruptions but was unable to do so. Eventually, the trial court excused defendant and had him placed in "lockup" where he would be able to hear the testimony through the speaker system. After defendant was allowed to return to the courtroom for the conclusion of the hearing, the trial court again told the defendant that disruptive behavior would not be tolerated and that he would be excused again if it were to continue.

People v Morgan, 400 Mich 527, 535; 255 NW2d 603 (1977).

Here, defendant was absent for only a short period[2] during voir dire before he returned, and he was present for the remainder of the trial. During his absence, several jurors were questioned, but defendant returned while questioning continued. There is no evidence in the record to support a finding that there was any "reasonable possibility" that defendant was prejudiced by this short absence. *Armstrong*, 212 Mich App at 129. Moreover, reversal is not warranted because the evidence does not support that defendant is actually innocent or that the alleged error seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Carines*, 460 Mich at 763-764. First, evidence of defendant's guilt was overwhelming and included BS's identification of defendant as the man who assaulted her, medical testimony that the minors had injuries consistent with their accounts of sexual assault, and a finding of defendant's DNA on multiple pieces of evidence, including a rectal swab taken from one of the minors. Second, defendant was absent for only a short time during voir dire, and he was allowed to return once he agreed to behave. Further, he was present for the remainder of the trial. Defendant is not entitled to a reversal on the basis of his temporary absence from voir dire.

B. RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied his Sixth Amendment right to counsel and effective assistance of

[2] Defendant was removed from the courtroom on page 32 of the record and he returned to the courtroom at page 69. Thus, in total, defendant was not present for 37 pages of voir dire out of a 103-page transcript. The record does not indicate the length of time of defendant's absence, but the record suggests that defendant was present for the majority of voir dire.

counsel because his counsel failed to (1) visit him often before trial and (2) argue at sentencing "some sort of combination of mitigation or guidelines challenge." We disagree.

We review defendant's claims pertaining to the presence and performance of his trial counsel as described above for errors apparent on the record because no *Ginther*[3] hearing took place related to these issues.[4] *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

The Sixth Amendment, as applied to states by the Fourteenth Amendment, guarantees that the accused in a criminal prosecution "shall enjoy the right . . . to have the Assistance of Counsel for his defence." US Const, Am VI; *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). This right to counsel "extends to all 'critical' stages of the proceedings where counsel's absence might harm defendant's right to a fair trial." *People v Burhans*, 166 Mich App 758, 764; 421 NW2d 285 (1988), citing *United States v Wade*, 388 US 218, 228; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). "The right to counsel attaches and represents a critical stage 'only at or after the initiation of adversary judicial proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment.' " *People v Anderson (After Remand)*, 446 Mich 392, 402; 521 NW2d 538 (1994) (citation omitted). "It is well established that a total or complete deprivation of the right to counsel at a critical stage of a

[3] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

[4] Although an evidentiary hearing was held pursuant to remand orders from both this Court and the Supreme Court, the testimony pertained to the taking of testimony by way of video conferencing at trial. Defendant's arguments regarding the effectiveness of his counsel in allowing video testimony have been resolved by the Supreme Court and are not presently before us.

criminal proceeding is a structural error requiring automatic reversal." *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005).

To prevail on his claim of ineffective assistance of counsel, defendant must meet the two-part test stated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Carbin*, 463 Mich 590, 599–600; 623 NW2d 884 (2001). First, defendant must show that his counsel's performance was so deficient "that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 US at 687. To do so, defendant must show that his counsel's performance "fell below an objective standard of reasonableness" under prevailing professional norms. *Id.* at 687-688. This Court presumes that counsel rendered adequate assistance. *Id.* at 690. Second, defendant must show that his counsel's deficient performance prejudiced his defense. *Id.* at 687. To do so, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Defendant maintains that his Sixth Amendment right to counsel was denied because defense counsel did not meet with him before the preliminary exam and did not discuss trial strategy with him. These allegations are properly categorized as claims of ineffective assistance of counsel, but they have no merit as such. See *People v Mitchell*, 454 Mich 145, 161 n 15; 560 NW2d 600 (1997), vacated on other grounds 536 US 901; 122 S Ct 2354; 153 L Ed 2d 177 (2002) ("Even if defendant and his mother were fully credible and [defense counsel] did not contact the witness and only met with the defendant three times, this is not a 'denial of counsel' during a critical stage. Rather, these are allegations of

deficient performance by counsel that must meet the *Strickland* standard."). There is no doubt that defendant was entitled to representation by counsel at the preliminary hearing, and he enjoyed such representation because the record indicates that trial counsel was present throughout the preliminary exam. See *Anderson*, 446 Mich at 402.

Defendant also maintains that defense counsel was ineffective because she "never met with [defendant] before the preliminary exam and never reviewed any sort of strategy before trial." Defendant claims that this inaction was prejudicial because "actually meeting with [defendant] to 'really sit down and go over our defense tactics' would have built some sort of relationship that might have resulted in accepting the plea bargain." However, the record establishes that defendant failed to cooperate with his defense counsel. At the preliminary hearing, defense counsel made the following statement:

> Your honor, I have not had an opportunity to speak with [defendant]. The history of this case which dates back to June of this year, my investigator and summer intern went out to speak with [defendant] at the County Jail after we were assigned to this case. At the time [defendant] was nonresponsive so my investigator was unable to speak with him. When we had the first preliminary examination scheduled on the 15th of June, [defendant] refused to come over from the County Jail so the matter was adjourned . . . .
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> [Defendant] has been -- has a [sic] another case of a similar nature pending in Ionia County and has been there pretty much on and off when he wasn't in Ann Arbor for the pendency of these proceedings. So I have not really had an opportunity to speak with him, and the only time that somebody from my office had a chance to speak with him he was nonresponsive.

Further, at trial, defense counsel told the trial court that defendant had provided her with a list of questions that he wished defense counsel to ask of certain witnesses. Defense counsel stated that she had used her discretion in utilizing this list and noted that when she had asked one of the questions requested by defendant, the unexpected answer conflicted with her theory of the case, which was that defendant was not the perpetrator. Defense counsel stated that

> I would not have asked the question, and I want the record to reflect that, although I have given [defendant] a lot of latitude here and that we have not had an opportunity to really sit down and go over our defense tactics and I am respecting his wishes and the questions he wishes to pose, I'm going to let the Court know at this point I'm going to exercise a heck of [sic] more restraint . . . .

This Court has noted that a defendant may not request substitute counsel if the defendant "purposely break[s] down the attorney-client relationship by refusing to cooperate with his assigned attorney." *People v Meyers (On Remand)*, 124 Mich App 148, 166-167; 335 NW2d 189 (1983). Similarly, defendant cannot allege that defense counsel was ineffective for failing to meet with him when defendant failed to cooperate with her staff during their visit.[5] Additionally, because defendant was moved between several facilities before trial, defense counsel's ability to meet with defendant was

[5] Although not binding, we find persuasive this Court's reasoning in *People v Pointer*, unpublished opinion per curiam of the Court of Appeals, issued September 18, 2007 (Docket No. 270327), p 3 (holding that the defendant received effective assistance of counsel because the record indicated that the defendant's actions had hindered counsel's attempts to represent him and that counsel had provided adequate representation), and *People v Cataldo*, unpublished opinion per curiam of the Court of Appeals, issued November 17, 2000 (Docket No. 219216), p 3 ("[T]he record makes clear that any deficiency resulted from defendant's failure to cooperate with his attorney, not from his attorney's inaction.").

hindered. Nevertheless, the record demonstrated that defense counsel pursued a valid theory of defense, vigorously cross-examined witnesses, objected to improper evidence when necessary, and presented an adequate closing argument. Defendant admits on appeal that "[t]he record reflects that counsel properly cross-examined all witnesses and offered a valid theory of defense." Therefore, defendant is unable to establish that defense counsel's performance fell below an objective standard of reasonableness and that a reasonable possibility exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. Therefore, defendant's Sixth Amendment right to counsel was not violated. *Id*.

Defendant also alleges that he was denied his right to counsel because defense counsel failed to offer mitigating circumstances or to challenge the sentencing guidelines at the sentencing hearing. This is a claim of ineffective assistance of counsel, rather than a denial-of-counsel claim as asserted by defendant. *Mitchell*, 454 Mich at 161 n 15. The Michigan Supreme Court has recognized that "[s]entencing is a critical stage of a criminal prosecution at which the right to counsel attaches." *People v Wakeford*, 418 Mich 95, 121; 341 NW2d 68 (1983). Defendant's claim that defense counsel was "virtually absent" and, thus, violated his Sixth Amendment right to counsel at critical stages of the proceedings is meritless. The record indicates that defense counsel was present throughout the sentencing hearing. Therefore, defendant was not deprived of his right to counsel. *People v Dickerson*, 17 Mich App 201, 203-204; 169 NW2d 336 (1969) (holding that the defendant was denied his Sixth Amendment right to counsel because he was not represented by counsel at sentencing).

Further, defendant alleges that he was denied effective assistance of counsel because "she offered absolutely no sort of advocacy, beyond attesting to no presentence inaccuracies or guidelines errors." Defendant maintains that defense counsel should have offered "some sort of combination of mitigation or guidelines challenge." The Michigan Supreme Court has recognized that "[t]he Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." *Mitchell*, 454 Mich at 164 (quotation marks and citation omitted). In addition, "[i]t is well established that defense counsel is not ineffective for failing to pursue a futile motion." *People v Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008). In his brief on appeal, defendant fails to specify what mitigating factors defense counsel should have presented at sentencing and what guideline challenges would have been appropriate. Defendant has thus not established the factual predicate of his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Moreover, testimony and DNA evidence at trial proved that defendant repeatedly assaulted two young girls. To require defense counsel to argue unknown mitigating factors or an unsubstantiated guidelines' challenge would have been futile in this case. *Brown*, 279 Mich App at 142. There is no error evident in the record to support defendant's claim that he was denied the effective assistance of counsel at sentencing.

C. DENIAL OF DEFENDANT'S MOTION FOR SUBSTITUTE COUNSEL

Defendant argues that the trial court erred when it did not either appoint substitute counsel or hold an evidentiary hearing when defendant sought substitute

counsel based upon a breakdown in communications between himself and his trial counsel. We disagree.

"The decision regarding substitution of counsel is within the sound discretion of the trial court and will not be upset on appeal absent a showing of an abuse of that discretion." *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

As discussed earlier, the Sixth Amendment guarantees a defendant's right to counsel. *Russell*, 471 Mich at 187. However, defendant "is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced." *Mack*, 190 Mich App at 14. "A defendant is only entitled to a substitution of appointed counsel when discharge of the first attorney is for 'good cause' and does not disrupt the judicial process." *People v O'Brien*, 89 Mich App 704, 708; 282 NW2d 190 (1979) (quotation marks and citation omitted). The circumstances that would justify good cause rest on the individual facts in each case. *Id*.

Our Supreme Court has recognized that, while an allegation of attorney disinterest warrants consideration by a trial court of the defendant's allegation, a defendant's conviction will not be set aside, even in the absence of judicial consideration of the defendant's allegation, if "the record does not show that the lawyer assigned to represent [the defendant] was in fact inattentive to his [or her] responsibilities." *Ginther*, 390 Mich at 442. In addition, this Court has recognized that "[a] complete breakdown of the attorney-client relationship or disagreement over whether a particular line of defense should be pursued may justify appointing new counsel." *O'Brien*, 89 Mich App at 708. In *Meyers*, 124 Mich App at 165, the defendant requested substitute trial counsel because the defendant was having

difficulty communicating with his counsel. "[The defendant] informed the [trial] court that he objected to his attorney because he was not the attorney of the defendant's choice, that he and his attorney disagreed about the case, and that he did not like the language his defense attorney used toward him." *Id.* at 166. However, the defendant had failed to cooperate with his counsel, and counsel expressed a willingness to work with the defendant. *Id*. "[The defendant] did not assert that his attorney was inadequate, lacking in diligence, or disinterested in his case." *Id*. Therefore, this Court held that there was not enough evidence to prove that the attorney-client relationship had broken down to a point where the appointment of substitute counsel was necessary. *Id.* Further, this Court has held that a defendant may not deliberately cause a breakdown of the attorney-client relationship by not cooperating with his counsel and then assert that there is a good reason for appointing new counsel. *Id*. at 166-167; see also *People v Cumbus*, 143 Mich App 115, 121; 371 NW2d 493 (1985) (noting that the defendant was not entitled to substitution of counsel because the breakdown in the attorney-relationship was caused by the defendant and because defendant failed to demonstrate that he had been prejudiced by the trial court's denial of his motion for substitute counsel).

In the present case, the first preliminary examination was scheduled for June 15, 2005, but defendant refused to attend. At the preliminary hearing on September 22, 2005, as described in part II(B) of this opinion, defendant's trial counsel noted that she was having difficulty contacting defendant because he was being moved around to various locations. She also noted that "the only time that somebody from my office had a chance to speak with him he was unresponsive." Further, at the preliminary hearing on October 3, 2005,

defendant stated to the trial court, "Your honor, I never did really get a chance to talk to my prior attorney, the—the female. So I never did really know who was my attorney." In a November 30, 2005, letter from trial counsel to defendant, details of the problems between trial counsel and defendant were set forth. By way of that correspondence, defense counsel forwarded copies of the police report, amended felony information, DNA results, and a competency report to defendant. She also bluntly warned defendant that his attempt to manipulate the system by "playing [the] crazy card" and being disruptive in court would not be successful.

In an August 15, 2006, pro se motion, defendant requested substitute counsel because trial counsel had yet to visit him in jail and because there had allegedly been a breakdown in his relationship with the public defender's office from the beginning. Defendant wrote, "I have been verbally and in writing accused [sic] of this case in their minds." The trial court did not consider the merits of defendant's claims in his pro per motion because counsel represented defendant.

The evidence in the record demonstrates that defendant and trial counsel did not have a completely amicable relationship. However, "the record does not show that [defendant's attorney] was in fact inattentive to [her] responsibilities," inadequate, or disinterested. *Ginther*, 390 Mich at 441-442; *Meyers*, 124 Mich App at 166-167. To the contrary, the evidence demonstrates that well over a year before trial began, defense counsel had gathered necessary materials, was familiar with the case, and was realistically informing defendant of the damaging nature of the DNA evidence and frivolity of his claimed insanity. Defendant complained that trial counsel had not visited him in jail; however, it appears from the record that this was not because of a lack of

effort on counsel's part. For a time, defendant was being moved around to different facilities, and counsel was unable to contact him. When counsel sent representatives to speak with defendant, he was nonresponsive, and he also refused to attend a preliminary hearing. By not responding to trial counsel's staff inquiries, defendant cannot now use lack of communication as justification for substitute counsel when he failed to respond. See *Meyers*, 124 Mich App at 166-167; see also *Cumbus*, 143 Mich App at 121. Accordingly, the trial court's failure to appoint substitute counsel was not an abuse of discretion, *Mack*, 190 Mich App at 14, because it did not fall outside the range of principled outcomes, *People v Terrell*, 289 Mich App 553, 558-559; 797 NW2d 684 (2010).

D. OTHER-ACTS TESTIMONY

Defendant argues that the testimony of LB, the victim of a 2004 sexual assault by defendant, should not have been admitted at trial because it was inadmissible other-acts evidence under MRE 404(b), was more prejudicial than probative and therefore inadmissible under MRE 403, and inadmissible under MCL 768.27a because that statute violates the Ex Post Facto Clauses of the United States and Michigan Constitutions, US Const, art I, § 10; Const 1963, art 1, § 10. We disagree.

At trial defendant objected to the admission of LB's testimony, and the prosecution argued that the evidence was admissible under MCL 768.27a. The trial court ruled that the testimony was admissible; therefore, this issue is preserved for appeal. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995) (issues raised before and decided by the trial court are preserved for review.). However, defendant did not object to LB's testimony on the basis that it violated MRE 404(b) or

the Ex Post Facto Clauses of the United States and Michigan Constitutions. Thus, these claims are unpreserved for appellate review. See *People v McPherson*, 263 Mich App 124, 137; 687 NW2d 370 (2004) ("Defendant failed to preserve this claim of error because he did not specifically object at trial on this ground . . . .").

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). However, "[w]hen the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *Id*. (quotation marks and citation omitted). We review defendant's unpreserved arguments for plain error. *Carines*, 460 Mich at 763-765.

MCL 768.27a states that, "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." A listed offense includes first-degree criminal sexual conduct, MCL 750.520b, and second-degree criminal sexual conduct, MCL 750.520c. *People v Dobek*, 274 Mich App 58, 88 n 16; 732 NW2d 546 (2007) ("The listed offenses [set forth in then MCL 28.722(e)(*x*)] include the various forms of criminal sexual conduct.").[6] In *Pattison*, 276 Mich App at 620, this Court held that, "[i]n cases involving the sexual abuse of minors, MCL 768.27a now allows the admission of other-acts evidence to demonstrate the likelihood of a defendant's criminal sexual behavior toward other minors." The

[6] Defendant was convicted in 2007. The statute defining listed offenses was amended by 2011 PA 17, effective July 1, 2011. Listed offenses are now set forth in MCL 28.722 (k), (s), (u), and (w).

Pattison Court concluded that the trial court did not err when it admitted testimony "regarding defendant's alleged sexual abuse of four other minors." *Id.* at 618. However, this Court cautioned "trial courts to take seriously their responsibility to weigh the probative value of the evidence against its undue prejudicial effect in each case before admitting the evidence. See MRE 403." *Id*. at 621; see also *People v Watkins*, 491 Mich 450, 481-486; 818 NW2d 296 (2012) (holding that evidence that is admissible under MCL 768.27a may still be excluded under MRE 403). MRE 403 states in part that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."

> [W]hen applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect. That is, other-acts evidence admissible under MCL 768.27a may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference. . . .
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> This does not mean, however, that other-acts evidence admissible under MCL 768.27a may never be excluded under MRE 403 as overly prejudicial. There are several considerations that may lead a court to exclude such evidence. These considerations include (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. This list of considerations is meant to be illustrative rather than exhaustive. [*Watkins*, 491 Mich at 487-488.]

In the present case, defendant was charged with multiple counts of first-degree criminal sexual conduct.

He had previously been convicted of sexually assaulting LB when she was 13 years old. LB's testimony established that defendant had a history of sexually assaulting young girls. The testimony also indicated that the manner in which the sexual assaults occurred in both instances were similar. Specifically, defendant engaged his victims initially under a ruse and then proceeded to forcefully sexually assault them while threatening them with a weapon. Multiple penetrations occurred, and the sexual positions were similar. The subject crimes and the incident involving LB also occurred within three years of one another. The evidence of each crime was supported by DNA evidence, establishing defendant as the offender. Evidence of the assault on LB was also relevant in explaining how the police had come into possession of defendant's DNA for comparison in this case. Although the evidence was highly prejudicial, it was also highly probative of defendant's propensity for sexually assaulting young girls. See *Pattison*, 276 Mich App at 615-616 (holding that evidence of the tactics the defendant used against a prior victim to commit CSC was probative of whether he used the same tactics to gain sexual favors from his daughter and its admission did not violate MRE 403). Evidence is not unfairly prejudicial under MRE 403 merely because it damages a party's case. *People v Vasher*, 449 Mich 494, 502; 537 NW2d 168 (1995). Rather, undue prejudice refers to "an undue tendency to move the tribunal to decide on an improper basis." *Id.* at 501. In this case, defendant has not demonstrated that the probative value of the evidence was substantially outweighed by the danger of undue prejudice. The trial court did not abuse its discretion by admitting this evidence under MCL 768.27a.

Defendant also claims that the application of MCL 768.27a violates the Ex Post Facto Clauses of the United

States and Michigan Constitutions because the sexual assaults occurred before the enactment of this particular statute. However, he concedes that this Court has already determined that this statute is not unconstitutional on this basis. Defendant states that he raised the issue solely to preserve the issue for further review. In *Pattison*, 276 Mich App at 619, this Court observed that this "altered standard does not lower the quantum of proof or value of the evidence needed to convict a defendant." Thus, this Court held that "the standard for obtaining a conviction against [the] defendant has not changed, and the application of MCL 768.27a to this case does not violate the Ex Post Facto Clause." *Id.*; see also *People v Wilcox*, 280 Mich App 53, 55-56; 761 NW2d 466 (2008), rev'd on other grounds 486 Mich 60 (2010); *People v Schultz*, 278 Mich App 776, 778-779; 754 NW2d 925 (2008). Under this Court's previous holdings, defendant's claim is meritless. *Pattison*, 276 Mich App at 619; *Wilcox*, 280 Mich App at 55-56; *Schultz*, 278 Mich App at 778-779.

Defendant also argues that the evidence was not admissible under MRE 404(b). In *Watkins*, 491 Mich at 472-481, our Supreme Court concluded that MCL 768.27a permits a prosecutor to introduce evidence of a defendant's commission of another listed offense against a minor without having to justify its admissibility under MRE 404(b). As previously discussed, the evidence was properly admitted under MCL 768.27a. Therefore, the prosecution did not also have to justify the admission of LB's testimony under MRE 404(b).

Accordingly, LB's testimony was properly admitted under MRE 768.27a.

Affirmed.

BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ., concurred.

WURTZ v BEECHER METROPOLITAN DISTRICT

Docket No. 301752. Submitted March 13, 2012, at Detroit. Decided October 2, 2012, at 9:05 a.m. Leave to appeal granted, 494 Mich 862.

Richard L. Wurtz brought an action under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., in the Genesee Circuit Court against Beecher Metropolitan District, Leo McClain, Jacquelin Corlew, and Sheila Thorn. On February 1, 2000, plaintiff signed a 10-year employment contract with the district, which provided water and sewage services in Genesee County. Plaintiff alleged that defendants violated the WPA when they decided not to renew his contract after he engaged in activities that amounted to whistleblowing during 2008 and 2009. The individually named defendants were three of the five elected board members for the district during the relevant period. Defendants moved for summary disposition under MCR 2.116(C)(10), asserting that plaintiff had not suffered an adverse employment action and that the district had no obligation to renew his contract. The court, Judith A. Fullerton, J., granted summary disposition in favor of defendants concluding that plaintiff had not suffered an adverse employment action. Plaintiff appealed.

The Court of Appeals *held*:

1. The elements of a prima facie case under the WPA are well established: (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action. Under the act, protected activity includes reporting to a public body a violation of a law, regulation, or rule. Plaintiff engaged in protected activity under the act when he reported to the local prosecutor and other governmental entities that he suspected that defendants had violated the Open Meetings Act, MCL 15.261 *et seq*., and when he met with members of the sheriff's office to report that he believed the individual defendants had acted illegally with regard to reimbursements they had claimed for attending an American Water Works Association conference in San Diego. For an employer's action to amount to an adverse employment action, the action must be materially adverse, meaning that

it must be more than a mere inconvenience or an alteration of job responsibilities. Nonrenewal of an employment contract may constitute an adverse employment action under the WPA. To hold otherwise would be to carve an arbitrary distinction between contractual and at-will employees. Accordingly, the trial court erred by granting summary disposition in favor of defendants on that basis.

2. Summary disposition before the close of discovery is appropriate if there is no reasonable chance that further discovery will result in factual support for the nonmoving party. However, summary disposition is inappropriate when questions of motive, intention, or other conditions of the mind are material issues. Whether nonrenewal of a contract amounts to an adverse employment action in a particular instance will depend on the circumstances of the case. In this case, summary disposition was premature. Plaintiff was not given an adequate opportunity to develop a record regarding whether the nonrenewal of his contract was an adverse employment action. Plaintiff had submitted a discovery request for documents concerning whether other contractual employees had their contracts renewed. Whether other employees' contracts were renewed pro forma was relevant to whether plaintiff's contract was not renewed because of his whistleblowing activity. Further, questions of material fact remained regarding when the district decided not to renew plaintiff's contract. Summary disposition was also improper because the motivation for defendants' decision not to renew plaintiff's contract was at issue.

Reversed and remanded.

K. F. KELLY, J., dissenting, would have affirmed the decision of the trial court. The WPA requires the existence of an employment relationship; its protections do not extend to cover former employees who seek reemployment, to preemployment negotiations, or to the refusal to hire. By plaintiff's own admission, defendants scrupulously adhered to the terms of his contract. Absent a contractual obligation or legal duty to consider an extension or renewal of an employment contract, a cause of action under the WPA is unavailing when a contractual employee finishes a fixed-term contract. Because plaintiff was not an employee under the act after his contract was fulfilled, he did not suffer an adverse employment action. Because no additional amount of discovery would have assisted plaintiff in developing his case, the trial court correctly granted summary disposition in favor of defendants.

LABOR RELATIONS — WHISTLEBLOWERS' PROTECTION ACT — ADVERSE EMPLOYMENT ACTIONS — NONRENEWAL OF AN EMPLOYMENT CONTRACT.

The elements of a prima facie case under the Whistleblowers' Protection Act are (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action; under the act, protected activity includes reporting to a public body a violation of a law, regulation, or rule; for an employer's action to amount to an adverse employment action, the action must be materially adverse, meaning that it must be more than a mere inconvenience or an alteration of job responsibilities; nonrenewal of an employment contract may constitute an adverse employment action under the act; whether nonrenewal of a contract amounts to an adverse employment action in a particular instance will depend on the circumstances of the case (MCL 15.361 *et seq*.).

Charles A. Grossmann for plaintiff.

Landry, Mazzeo & Dembinski, P.C. (by *David B. Landry* and *Nancy V. Dembinski*), for defendants.

Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ.

JANSEN, J. Plaintiff appeals by right an order granting summary disposition to defendants in this action under the Whistleblowers' Protection Act (WPA).[1] We reverse and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

This case pertains to the last two years of plaintiff's employment with Beecher Metropolitan District. The district provides water and sewage services to approximately 4,000 residential and commercial customers

[1] MCL 15.361 *et seq*.

near Flint. The three individually named defendants, McClain, Corlew, and Thorn, were three of five elected board members for the district at all times relevant to this case.

On February 1, 2000, plaintiff signed an employment contract with the district. The contract provided that the district would employ plaintiff from February 1, 2000, until February 1, 2010, as the district's administrator. The parties do not dispute that plaintiff was employed for the full 10-year period under the contract, nor do the parties dispute that plaintiff received all compensation to which he was entitled under his contract. Rather, plaintiff alleges that he was discriminated against under the WPA when defendants decided to not renew his contract. Plaintiff alleges that, over the course of a two-year period, he engaged in activities that amounted to whistleblowing under the WPA, and that his contract was not renewed as a consequence of his whistleblowing activity.

A. 2008

In May 2008, plaintiff sent a letter to the Genesee County Prosecutor, the Genesee County Sheriff, and the Mt. Morris Township police chief. The letter alleged that McClain, Corlew, and Thorn had violated the Open Meetings Act (OMA).[2] Specifically, the letter claimed that plaintiff, in his capacity as administrator, had received a billing statement from an attorney indicating that on April 2, 2008, the attorney had met privately with board members McClain, Corlew, and Thorn. Plaintiff, in his letter, inferred that, because this attorney had no existing arrangement with the district, "a majority of the [board] had met privately . . . [with the

[2] MCL 15.261 *et seq*.

attorney] to discuss public business." The letter noted that the board had later voted to hire the attorney. The letter also claimed that the attorney, along with McClain, Corlew, and Thorn, had "attended a . . . union negotiating session. Neither [plaintiff], nor any other staff, nor the other 2 members of the Board, knew anything in advance about this meeting, which was not scheduled as a special meeting with the appropriate 18-hour notice to the public." Plaintiff alleged that, because the April 2 meeting and the subsequent union negotiating session were private meetings involving a majority of the board, those meetings violated the OMA.

It is unclear whether the sheriff or police chief responded to the letter, but David Leyton, the Genesee County Prosecutor, did. He wrote that criminal prosecution was but one remedy for OMA violations and that he did not believe that the events described by plaintiff warranted criminal investigation. The prosecutor accordingly did not act on plaintiff's letter.

B. 2009

In January 2009, plaintiff sent a memorandum to McClain, the board president, proposing an extension and alteration of his employment contract. Plaintiff recommended that the district extend his employment to August 1, 2012, and reduce his salary and benefits, which would save the district about $33,000. At its February 11, 2009 meeting, the board told plaintiff that he could present the amended contract to the board, but at its March 11, 2009 meeting, a motion to have "[plaintiff] draw up an employment agreement with [the board's attorney]" failed; McClain, Corlew, and Thorn voted against the motion.

In May 2009, plaintiff expressed disapproval, in a memorandum sent to the board, about the possible

expense to taxpayers of the board members' upcoming trip to San Diego for the American Water Works Association (AWWA) conference. Plaintiff noted that the trip was projected to cost taxpayers $29,000, which included trips for the board members to Sea World and the San Diego Zoo. Moreover, the board members were apparently planning on driving to San Diego for the conference; plaintiff noted that "if gas mileage is given [for the board members to drive], as previously requested, that amounts to over $11,000.00, whereas members can fly from Bishop Airport . . . for $280.00 round trip . . . . Another $4,000.00 could be saved for food and lodging for the nearly ten days requested for travelling [by car]." Plaintiff's memorandum requested that the board pass resolutions detailing the method of compensation for travel, and recommended that the board members be reimbursed only for the price of airfare even if they opted to drive to the AWWA conference.

On July 8, 2009, plaintiff asked the board to hold a special meeting to discuss the possibility of "mutually discontinu[ing]" their relationship, and an attempt at that meeting was held on July 15, 2009. Plaintiff, however, refused to meet with the board because the board had its attorney present for the meeting, and plaintiff interpreted the attorney's presence as a breach of the "gentlemen's understanding" that the meeting would be an open dialogue between the board and plaintiff only. Plaintiff indicated that he was "frustrated" with the board, but wanted to continue his employment with the district and expressed his desire to do so.

In August 2009, after the AWWA conference, plaintiff met with members of the Genesee County Sheriff's Office to discuss his belief that the board members had acted improperly or illegally regarding reimbursements

for their trip to the AWWA conference. For example, plaintiff was concerned that the board members had gone to the San Diego Zoo, Sea World, and lavish dinners with family and friends, all at taxpayer expense. Additionally, plaintiff told the sheriff's office that four of five board members actually flew to San Diego, but had reported that they drove, accordingly receiving an amount of per diem compensation and reimbursement for mileage that they were not entitled to claim.

Following defendant's meeting with the sheriff's office, a criminal investigation of the board members ensued. At least one article about the board members' reimbursements from the AWWA conference appeared in the Flint Journal. Public attendance at board meetings increased, and at those meetings members of the public began openly questioning board members about their travel expenses.

On November 11, 2009, Thorn made a motion to not extend plaintiff's employment contract beyond its expiration and to begin looking for a new administrator. The motion passed the board three votes to two. McClain, Corlew, and Thorn voted in favor of the motion.

C. 2010

Plaintiff's last day of employment with the district was January 31, 2010. On January 19, 2010, plaintiff filed a complaint alleging that defendants had violated the WPA by not renewing his employment contract; plaintiff alleged that the board's decision to not renew his contract was retaliation for his reporting suspected violations of, *inter alia*, the OMA, the Freedom of Information Act,[3] and other Michigan statutes.

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[3] MCL 15.231 *et seq*.

On October 18, 2010, plaintiff served defendants with a request for production of employment contracts and records. Among other things, plaintiff asked for "the written contracts . . . [of] non-union employees who were employed anytime with the District between 1990 to the present." Defendants did not produce these documents.

On November 15, 2010, defendants filed a motion for summary disposition under MCR 2.116(C)(10), in which they argued that plaintiff did not suffer an adverse employment action because "there is no evidence that Defendants discharged, threatened, or discriminated against the Plaintiff regarding his compensation, terms, conditions, location or privileges of employment." In any case, defendants argued, the board had no obligation to renew plaintiff's contract. Defendants also argued that the board's decision to not renew plaintiff's employment contract was made for the first time in March 2009, well before any of the events surrounding the AWWA conference and reimbursements. That decision, according to defendants, was merely "reiterated" in November 2009, when the board formally voted to not renew defendant's employment.

Concurrent with the time frame of this case, the criminal case against the board members, including McClain, Corlew, and Thorn, related to the AWWA conference expenses and reimbursements, continued. The trial judge dismissed the charges against McClain, and a jury returned verdicts of not guilty in favor of Corlew, Thorn, and the other board members. In its response to defendants' summary disposition motion, plaintiff argued that summary disposition was premature because at the time he served them with discovery requests, the criminal case against McClain, Corlew, and Thorn was still pending, and "the individual De-

fendants . . . exercised their 5th Amendment rights" and did not respond to discovery requests. Plaintiff asserted that "[n]ow, the Defendants, after taking the Plaintiff's deposition, but not allowing their own, [are] refusing to provide the requested information . . . ."

The trial court granted defendants' motion for summary disposition on December 6, 2010. After noting that whether nonrenewal of an employment contract amounts to an adverse employment action under Michigan law appears to be an issue of first impression, the trial court explained:

> [I]n this case the contract for the plaintiff did expire in February of '10—February 1. And despite the activities that took place earlier in the year of reporting by [plaintiff] to a public body and public officials . . . everything from the [Flint] Journal [newspaper] to the sheriff's department and the prosecutor, the Board, and I'm surprised it happened, let him stay on to February 1 of '10. And so I find there's no adverse employment action by the District and that summary disposition should be granted and I grant it.

Plaintiff now appeals by right.

II. STANDARD OF REVIEW

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition."[4]

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admis-

[4] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> sions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.[5]

"Whether a plaintiff has established a prima facie case under the WPA is a question of law subject to review de novo."[6]

III. ANALYSIS

The elements of a prima facie case under the WPA are well established: "(1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action."[7]

The parties do not dispute that the first element of the prima facie case is satisfied here. In May 2008, plaintiff reported to the local prosecutor and other governmental entities that he suspected that defendants had violated the OMA; in August 2009, plaintiff met with members of the sheriff's office to report that he believed defendants had acted illegally with regard to the AWWA conference reimbursements. The WPA defines "protected activity" as, among other things, " 'reporting to a public body a violation of a law, regulation, or rule . . . .' "[8] Accordingly, plaintiff's actions amount to a "protected activity" under the WPA.

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[5] *Id*. at 120.

[6] *Manzo v Petrella*, 261 Mich App 705, 711; 683 NW2d 699 (2004).

[7] *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003).

[8] *Truel v City of Dearborn*, 291 Mich App 125, 138; 804 NW2d 744 (2010) (citation omitted).

Defendants focus their argument on the second element of the prima facie case, arguing that plaintiff was a contractual employee, and the failure to renew his contract was not, and could not be, an adverse employment action because plaintiff had no expectation of employment after the expiration of his contract, the terms of which were fulfilled.

Michigan courts have defined "adverse employment action" in the context of Michigan's Civil Rights Act (CRA)[9] and in the WPA context. Those definitions are identical. In both contexts, for an employer's action to amount to an adverse employment action, the action must be "materially adverse," meaning that it must be more than a "mere inconvenience or an alteration of job responsibilities . . . ."[10] This definition of "adverse employment action" initially arose in federal courts, in the context of federal workplace discrimination laws,[11] and was eventually adopted by Michigan courts for purposes of the CRA[12] and the WPA.

Michigan courts have also suggested that, in the CRA context, the nonrenewal of an employment contract may amount to an adverse employment action,[13] although no Michigan case addresses the issue squarely.

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[9] MCL 37.2101 *et seq*.

[10] *Meyer v City of Center Line*, 242 Mich App 560, 569; 619 NW2d 182 (2000) (CRA context) (citation and quotation marks omitted); *Brown v Detroit Mayor*, 271 Mich App 692, 706; 723 NW2d 464 (2006), aff'd in relevant part, 478 Mich 589 (2007) (WPA context) (citations and quotation marks omitted).

[11] See, e.g., *Crady v Liberty Nat'l Bank & Trust Co of Indiana*, 993 F2d 132, 136 (CA 7, 1993).

[12] *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 362-366; 597 NW2d 250 (1999) (adopting *Crady*'s definition of "adverse employment action" for CRA purposes).

[13] See, e.g., *Barrett v Kirtland Community College*, 245 Mich App 306, 313-324; 628 NW2d 63 (2001) (accepting without analysis that the

There are no Michigan cases interpreting the WPA that address the issue at all. "Though not binding on this Court, federal precedent is generally considered highly persuasive when it addresses analogous issues. In the context of discrimination cases, federal precedent may be consulted for guidance."[14] Accordingly, because the WPA's definition of "adverse employment action" derives from the federal courts' interpretation of the same term as used in federal discrimination laws, we turn to the federal courts for guidance regarding whether nonrenewal of a contract may amount to an adverse employment action.

This issue was addressed directly by the United States Court of Appeals for the Second Circuit in *Leibowitz v Cornell University*.[15] In *Liebowitz*, the plaintiff, a 51-year-old female university professor, accepted an early retirement package after her employer did not offer her an extension of her employment contract.[16] The plaintiff sued under Title VII of the Civil Rights Act of 1964 (Title VII)[17] and the Age Discrimination in Employment Act (ADEA).[18] The trial court granted summary judgment in favor of the defendants, holding that the plaintiff had failed to establish a prima facie case of discrimination because, among other reasons, she was "unable to produce any evidence that she had or held any right to a tenured position . . . ."[19] The appellate court reversed and held that when an em-

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nonrenewal of a contract was an adverse employment action but determining that the plaintiff was not entitled to relief because she could not establish causation).

[14] *Wilcoxon*, 235 Mich App at 360 n 5 (citations omitted).

[15] *Leibowitz v Cornell Univ*, 584 F3d 487 (CA 2, 2009).

[16] *Id*. at 492-496.

[17] 42 USC 2000e *et seq*.

[18] 29 USC 621 *et seq*.

[19] *Leibowitz*, 584 F3d at 497 (citation and quotation marks omitted).

ployee seeks renewal of his or her employment contract, the nonrenewal of the employment contract may be an adverse employment action for purposes of Title VII and the ADEA.[20] The court explicitly rejected the trial court's reasoning that the nonrenewal was not adverse because the defendants did not terminate the plaintiff's employment, but rather simply "chose not to renew her appointment . . . ."[21] According to the appellate court, under the trial court's reasoning "an employee could bring a discrimination lawsuit if an employer refused to hire her based on her age and/or gender, but not if the same employer failed to renew an employment contract for the same discriminatory reasons."[22] The court explained that its decision appeared to be consistent with the view of a majority of the federal circuit courts. The court explained:

> [I]n reaching this decision, we join other circuit courts that have, either implicitly or explicitly, held that nonrenewal of a contract may constitute an adverse employment action for purposes of the discrimination laws. *See, e.g., Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 320 (3d Cir.2008) ("The failure to renew an employment arrangement, whether at-will or for a limited period of time, is an employment action, and an employer violates Title VII if it takes an adverse employment action for a reason prohibited by Title VII . . . ."); *Carter v. Univ. of Toledo*, 349 F.3d 269, 270-71 (6th Cir.2003) (reversing district court's grant of summary judgment in employer's favor on plaintiff's race discrimination claim under Title VII in connection with employer's failure to renew her contract as a visiting professor); *Minshall v. McGraw Hill Broad. Co.*, 323 F.3d 1273, 1279-82 (10th Cir.2003) (sufficient evidence existed for jury to reasonably conclude that employer unlawfully discriminated against employee based

[20] *Id.* at 501.

[21] *Id*. at 499 (citation and quotation marks omitted).

[22] *Id*. at 500.

> on age under the ADEA in deciding not to renew his contract); *Mateu-Anderegg v. Sch. Dist. of Whitefish Bay*, 304 F.3d 618, 625 (7th Cir.2002) (noting, where teacher claimed non-renewal of contract was discriminatory under Title VII, that "[i]t is undisputed . . . that [plaintiff] suffered an adverse employment action"); *Kassaye v. Bryant Coll.*, 999 F.2d 603, 607 (1st Cir.1993) (noting that "act of refusing to renew appellant's employment at Bryant College" may provide grounds for discrimination claim).[23]

We find the federal courts' reasoning persuasive. Were we to hold that nonrenewal of a contract cannot, under any circumstances, qualify as an adverse employment action under the WPA because a contractual employee has no expectation of further employment past the expiration of his or her contract, we would carve an arbitrary distinction between contractual and at-will employees (who have no expectation of further employment from day to day).[24] Accordingly, we decline to hold that, as a matter of law, the failure to renew an employment contract cannot be an adverse employment action under the WPA. The trial court erred by granting summary disposition on that basis.

Whether nonrenewal amounts to an adverse employment action in a particular instance will depend on the circumstances of the particular case. Here, plaintiff was not given sufficient opportunity to develop a record regarding this question. "The purpose of discovery is to simplify and clarify the contested issues, which is necessarily accomplished by the open discovery of all relevant facts and circumstances related to the controversy."[25] "[S]ummary disposition before the close of

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[23] *Id.* at 501 (second and third alterations in original).

[24] See *Franzel v Kerr Mfg Co*, 234 Mich App 600, 606; 600 NW2d 66 (1999) (stating that at-will employees have no reasonable expectation of continued employment).

[25] *Hamed v Wayne Co*, 271 Mich App 106, 109; 719 NW2d 612 (2006).

discovery is appropriate if there is no reasonable chance that further discovery will result in factual support for the nonmoving party."[26] On October 18, 2010, plaintiff submitted a discovery request for documents that may have yielded factual support for his position. Specifically, plaintiff requested that the district produce records regarding whether other contractual employees had their contracts renewed. These records may have provided factual support for plaintiff's position: if other similarly situated employees had their contracts renewed pro forma, plaintiff's claim that the decision to not renew his contract was adverse becomes more credible. Defendants did not respond to plaintiff's request, but instead filed their motion for summary disposition. Accordingly, plaintiff was denied the opportunity to uncover evidence that might have supported his position that the nonrenewal of his contract was an adverse employment action. Similarly, the production of these documents would be relevant to the third prong of the WPA prima facie case: causation. That is, whether other employees' contracts were renewed pro forma is relevant with regard to whether plaintiff's contract was not renewed because of his whistleblowing activity.

Defendants argue that the decision to not renew plaintiff's contract occurred on March 11, 2009, several months before he engaged in protected activity regarding the AWWA conference reimbursements. Accordingly, defendants argue, the decision to not renew his contract could not have been adverse to him because it was made before his whistleblowing activities.[27] How-

[26] *Colista v Thomas*, 241 Mich App 529, 537-538; 616 NW2d 249 (2000).

[27] Similarly, the timing of defendants' decision is relevant to the causation element of the WPA prima facie case: if the decision not to

ever, defendants ignore the fact that the first instance of whistleblowing activity occurred in May 2008, over a year before his contract's nonrenewal, when plaintiff reported suspected OMA violations to the local prosecutor. Moreover, plaintiff denies that the decision to not renew his contract was made on March 11, 2009; he claims that the decision to not renew his contract occurred at the November 11, 2009, board meeting. Summary disposition under MCR 2.116(C)(10) was therefore premature, as there remains a genuine issue of material fact regarding whether the board's decision occurred in March or November 2009.

Summary disposition was not only premature, but improper. "[S]ummary disposition is inappropriate where questions of motive, intention, or other conditions of the mind are material issues."[28] What motivated defendants' decision to not renew plaintiff's contract is central to this case. Moreover, summary disposition was improper because this case requires a credibility determination regarding defendants' reasons for not renewing plaintiff's contract.[29] Accordingly, because summary disposition was both prematurely and improperly granted, we reverse the trial court's grant of summary disposition and remand for discovery with regard to whether other employees had their contracts renewed, and with regard to what motivated defendants' decision to not renew plaintiff's contract in this case.

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renew plaintiff's contract was made before his whistleblowing activity, the nonrenewal would not be because of his whistleblowing activity.

[28] *Pemberton v Dharmani*, 207 Mich App 522, 529 n 1; 525 NW2d 497 (1994).

[29] *Ykimoff v W A Foote Mem Hosp*, 285 Mich App 80, 128; 776 NW2d 114 (2009) ("It is well settled that where the truth of a material factual assertion of a moving party's affidavit depends on the affiant's credibility, there exists a genuine issue to be decided at trial by the trier of fact and a motion for summary disposition cannot be granted.") (quotation marks and citation omitted).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

WHITBECK, P.J., concurred with JANSEN, J.

K. F. KELLY, J. (*dissenting*). I respectfully dissent. Plaintiff, whose written contract of employment was completely fulfilled, never suffered an "adverse employment action" as an employee under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. The majority has not only rewritten plaintiff's contract, but it has also added language to the WPA to create a new cause of action for pre- or postemployment conduct when one simply does not exist. The WPA requires the existence of an employment relationship. By plaintiff's own admission, defendants scrupulously adhered to the terms of his contract. Plaintiff now seeks damages because defendants abided by the terms of his employment contract. Plaintiff's position is illogical and lacks any support in our jurisprudence. Absent a contractual obligation or legal duty to consider an extension or renewal of an employment contract, a cause of action under the WPA is unavailing when a contractual employee finishes a fixed-term contract. Because plaintiff did not suffer an adverse employment action and because no amount of additional discovery would have assisted plaintiff in developing his case, I would affirm the trial court.

I. BASIC FACTS

Plaintiff was the district administrator for defendant Beecher Metropolitan District. The district has 12 employees and 5 elected board members. Plaintiff was the only nonunion employee; all other employees were covered by collective-bargaining agreements

during the relevant years. The three individual defendants, Leo McClain, Jacquelin Corlew, and Sheila Thorn, were district board members. Plaintiff readily admits that his relationship with the three individual board members was very poor, dating to well before he engaged in any whistleblowing activities. He did not "get along" with Thorn even before she was elected to the board and believed she wanted "[him] gone" as the administrator from the day she was elected. Plaintiff's relationship with McClain deteriorated in 2004 and plaintiff would not have been surprised to learn that McClain wanted him removed as the administrator. Initially, plaintiff had a good working relationship with Corlew, but that only lasted until approximately 2007 when the relationship deteriorated because of "disagreements."

Plaintiff was employed pursuant to a written contract of employment from February 1, 2000, to February 1, 2010. The contract provided that he could only be terminated for cause. He typically worked from approximately 8:00 a.m. to 12:00 noon for the district and would then go to work at his private law firm. In 2008 he earned $79,332 in addition to retirement contribution benefits, life insurance, sick and personal days, a car allowance, and health insurance. The contract did *not* contain a renewal clause. Plaintiff does not contest that he was employed for the full term of his contract and received his full salary and benefits. He further conceded in his deposition testimony that the district was under no obligation to continue his contract beyond February 1, 2010:

> *Q*. Exhibit No. 1 that I have marked, the Employment Agreement, that contract does not provide by its expressed terms for you to be employed by the township after February 1, 2010, does it?

A. No.

Q. Paragraph 8 provides that any modifications or alterations to that Agreement shall be of force and effect only when in writing and executed by both parties. Were there ever such written modifications?

A. Not that I recall.

Q. Under the expressed terms of this contract, sir, Beecher Metropolitan District did not have any obligation to employ you beyond February 1 of 2010, did they?

A. There's no provision in this contract for that.

In January 2009, the district's accountants informed the district that it needed to increase revenues, decrease expenses, or both.[1] On January 30, 2009, plaintiff wrote the board offering to amend his employment contract and become a "contract" employee.[2] Of particular note, in order to become a "contract" employee, plaintiff understood that he would have to cease to be employed by the district for a minimum period of 30 days from the termination of his employment to the beginning of any period of "contract" employment—in other words, become a former employee. In closing plaintiff stated:

> Due to the complexity and time needed, this process would need to be commenced very shortly in order for the full benefit for Beecher to accrue. Further, there is no sense in me pursuing this without an indication that the Board is generally in favor or not in favor of the general framework described above. Therefore, please individually advise as soon as possible whether or not to pursue this. Once I know

[1] During the entire length of plaintiff's employment as the district administrator, the district continued to lose money.

[2] As described in plaintiff's proposal, a contract employee is a retiree who, after being separated for a minimum of 30 days, returns to the same position as previously held but under different terms and conditions, including no longer receiving retirement contributions.

> the Board's feelings, I could have my proposal available for the February Board meeting.
>
> * * *
>
> Finally, I'd like to emphasize no matter what your decision is, it has been a pleasure to have worked here. I thank you! Also, it would be arrogant to imply this is a "take it or leave it" offer. While I really believe the outline is fair and produces both short term and long term benefit to [the district], I would be open to certain modifications in an effort to show good faith.

On March 11, 2009, the board declined to have plaintiff draw up a new contract with its labor attorney, thus leaving plaintiff's written contract in full force and effect.

Two months later, plaintiff began his whistleblowing reporting.[3]

II. STANDARDS OF REVIEW

"We review de novo the decision of the trial court on the motion for summary disposition." *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008). In this case, the trial court reviewed defendant's motion for summary disposition under MCR 2.116(C)(10). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618,

[3] The case at bar is strikingly reminiscent of *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 621; 566 NW2d 571 (1997) ("The primary motivation of an employee pursuing a whistleblower claim 'must be a desire to inform the public on matters of public concern, and not personal vindictiveness.' ").

621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ." *Nuculovic v Hill*, 287 Mich App 58, 62; 783 NW2d 124 (2010).

We also review de novo questions of statutory interpretation. *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997). "The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision." *Id.* Therefore, "[i]f the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Id*. This Court interprets and applies statutes to give effect to the plain meaning of the text. *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011); *McManamon v Redford Charter Twp*, 273 Mich App 131, 135-136; 730 NW2d 757 (2006). "We cannot read requirements into a statute that the Legislature did not put there." *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 423; 565 NW2d 844 (1997).

III. ANALYSIS

To resolve the issue presented in this case, we must first look to the actual language of the WPA. In order for plaintiff to have suffered an adverse employment action, he must have first enjoyed the status of an "employee." MCL 15.362 of the WPA provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an *employee* regarding the *employee's* compensation, terms, conditions, location, or privileges of employment because the *employee*, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of

> a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [Emphasis added.]

For purposes of the WPA, an "employee" is specifically defined as "a person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied." MCL 15.361(a). By its plain language, the protections of the WPA do *not* extend to preemployment negotiations or refusal to hire. Nor does it extend to cover former employees who seek reemployment. It only applies to an *employee* regarding the *employee's* compensation, terms, conditions, location, or privileges of employment. Thus, on its face, plaintiff's cause of action fails as a matter of law because his complaints are only directed at the district's refusal or failure to negotiate a new contract with a different termination date. Refusing to rehire or renew employment past the termination date of a written employment contract is simply not within the plain language of the WPA. Plaintiff, whose contract was fulfilled and terminated by its express terms, no longer falls within the definition of "employee," which the majority seeks to expand. "[T]he proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges." *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002).

A prima facie case under the WPA requires a plaintiff to show that (1) he or she was engaged in a protected activity, (2) he or she suffered an adverse employment action, and (3) there was a causal con-

nection between the protected activity and the adverse employment action. *West v Gen Motors Corp*, 469 Mich 177, 183–184; 665 NW2d 468 (2003). In this case, the trial court concluded that plaintiff failed to meet the second prong of this three-part test. Contrary to the majority, I believe the trial court properly concluded that plaintiff failed to establish that he had suffered an adverse employment action. Plaintiff was no longer an employee when his contract expired; therefore, it follows that he could not have suffered an adverse employment action.

Plaintiff was employed pursuant to a 10-year written employment contract. It could only be modified by mutual agreement in writing. By the express terms of his employment contract, plaintiff's employment ceased on February 1, 2010. Any adverse employment action, therefore, must be considered in terms of the four corners of plaintiff's employment contract. It is uncontested that no action, adverse or otherwise, was taken under the terms and conditions of the contract, none.

Despite the fact that the employment contract did not contain a renewal clause, plaintiff argues that he had a continuing "employment relationship" with the district and that the WPA does not limit claims to the length of an employment contract. In so doing, plaintiff likens himself to an at-will employee. The majority agrees, stating that

> [w]ere we to hold that nonrenewal of a contract cannot, under any circumstances, qualify as an adverse employment action under the WPA because a contractual employee has no expectation of further employment past the expiration of his or her contract, we would carve an arbitrary distinction between contractual and at-will employees (who have no expectation of further employment from day to day). [*Ante* at 88.]

The distinction between an at-will employee and a contract employee is not arbitrary; they are in radically different employment relationships.

In this case, there was a written contract of employment. When interpreting a contract, the examining court must ascertain the intent of the parties by evaluating the language of the contract in accordance with its plain and ordinary meaning. *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). If the language of the contract is clear and unambiguous, it must be enforced as written. *Id*. A contract is unambiguous when it fairly admits of one interpretation. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). "A court may not rewrite clear and unambiguous language under the guise of interpretation. Rather, courts must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Woodington v Shokoohi*, 288 Mich App 352, 374; 792 NW2d 63 (2010) (citations and quotation marks omitted). The intent of the parties is determined from the four corners of the contract. *Rogers v Great Northern Life Ins Co*, 284 Mich 660, 667; 279 NW 906 (1938). "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate." *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924).

In stark contrast to a contract of employment, employment at will is "terminable at any time and for any—or no—reason, unless that termination [is] contrary to public policy." *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 572-573; 753 NW2d 265 (2008). Unlike an at-will employer, who must take affirmative steps to alter the course of an at-will employee's status, the employment relationship for one

under a contract of employment for a specified period simply expires, requiring no action on behalf of the employer. An at-will employment arrangement, therefore, is necessarily of uncertain duration; terminating an at-will employee necessarily affects the compensation, terms, conditions, location, or privileges of employment. In contrast, the written employment contract at issue here was very specific as to the terms of employment, including its duration, which had been agreed to in writing by both parties.

If I were to accept plaintiff's analysis, I would have to accept that his employment would have continued past the expiration of his contract, regardless of the express terms of the contract. In other words, accepting plaintiff's analysis would render the termination date and modification clause of plaintiff's contract nugatory. I would also have to accept that implied in every written contract, there is an obligation or duty to the parties to renew or continue the employment if desired by the employee. This has no support whatsoever in our jurisprudence and in fact the premise is widely rejected. *Scholz v Montgomery Ward & Co, Inc*, 437 Mich 83, 93; 468 NW2d 845 (1991) (stating that an implied contract is not actionable when there is an express contract covering the same subject matter.) In this case, the employment contract covered the topic of the duration of plaintiff's employment. It also required that any modifications had to be mutually agreed on in writing.[4] Even plaintiff concedes that under the contract defendants had no obligation to employ him beyond its terms, but he argues merely that the contract *should* have been extended because, in his opinion, he was an

[4] This illustrates the absurdity of plaintiff's position: in reality he is complaining that because of his whistleblowing, defendants scrupulously adhered to the terms of his contract.

"exemplary" employee. However, once plaintiff's contract of employment terminated on its own terms, plaintiff was no longer an employee; instead, he was merely a *candidate* for future employment. He only had a unilateral hope of being reemployed as a contract employee—nothing more than a "woulda, coulda, shoulda" claim. This is particularly true in light of the fact that he would have to have been completely separated from the district for at least 30 days before being reemployed under a new contract because of conditions imposed by the Municipal Employees' Retirement System. Plaintiff's general expectation that he could enter into a new contract in subsequent years was not supported by the express terms of his employment contract or any legal duty or obligation. There was nothing in the employment contract providing for a term of employment (or potential extension of a term of employment) greater than the term specifically set forth therein. There was no obligation for continuous employment; in fact, the contract expressly limited the term of employment. Given that plaintiff's employment contract provided for a finite term of employment, his right to employment arose from the contract and only the contract.

Both plaintiff and the majority treat the situation as a "failure to renew" when, in fact, plaintiff's employment contract did not contain a renewal clause and defendants had no duty to renew. The use of the phrase "failure to renew" is meaningless in this case; there cannot be a failure to act unless there is first an obligation, duty, or contractual requirement to act. Plaintiff's contract simply terminated on its own and a new contract was never entered into, despite the unilateral hope of plaintiff. In this case, plaintiff's employment concluded by its own terms and no adverse action was taken.

In order to support the contention that this case is about a "failure to renew" or some legal obligation to "continue" plaintiff's employment, the majority mistakenly conflates the WPA with Michigan's Civil Rights Act (CRA), MCL 37.2101 *et seq*. While our Courts may have assigned the identical definition of "adverse employment action" to both the WPA and the CRA, the two statutes combat entirely different evils and comparing the CRA to the WPA to determine whether plaintiff was an employee is misguided. The CRA explicitly covers preemployment conduct whereas the WPA does not. The CRA specifically provides:

> The opportunity *to obtain employment*, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities *without discrimination* because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, *is recognized and declared to be a civil right*. [MCL 37.2102(1) (emphasis added).]

By its very terms, the CRA allows a plaintiff to bring an action alleging discrimination on the basis of an employer's preemployment conduct. No such right exists under the WPA. Instead, the WPA is aimed at alleviating " 'the inability to combat corruption or criminally irresponsible behavior in the conduct of government or large businesses,' " by encouraging *employees*, who are the group best positioned to report violations of the law, to report violations by reducing their fear of retribution through prohibiting *employer* reprisals against whistleblowing employees. *Shallal*, 455 Mich at 612, quoting *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 75; 503 NW2d 645 (1993), overruled in part on other grounds by *Brown v Detroit Mayor*, 478 Mich 589; 734 NW2d 514 (2007). Thus, a plaintiff bringing an action under the WPA must

be an employee while no such requirement exists under the CRA.

In the context of the CRA, an "adverse employment action" includes the failure to hire or renew a contract, which occurred in *Leibowitz v Cornell University*, 584 F 3d 487 (CA 2 2009), relied on by the majority. However, I am concerned by the majority's use of federal law in this case. To the extent the majority relies on federal court decisions, this Court is not bound to follow federal caselaw interpreting a federal law, even when similar in language to our state law. *36th Dist Court v Mich AFSCME Council 25, Local 917*, 295 Mich App 502, 511; 815 NW2d 494 (2012). Our Supreme Court has cautioned:

> While federal precedent may often be useful as guidance in this Court's interpretation of laws with federal analogues, such precedent cannot be allowed to rewrite Michigan law. The persuasiveness of federal precedent can only be considered after the statutory differences between Michigan and federal law have been fully assessed, and, of course, even when this has been done and language in state statutes is compared to similar language in federal statutes, federal precedent remains only as persuasive as the quality of its analysis. [*Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 283; 696 NW2d 646 (2005).]

Moreover, even if *Leibowitz* were applicable, it is distinguishable from the case at bar. The contract in *Leibowitz* contained a renewal clause. The action was neither brought under the WPA nor a similar New York statute; rather it sought damages alleging, *inter alia*, gender and age discrimination under Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq*., and the Age Discrimination in Employment Act, 29 USC 621 *et seq*. In an action under Michigan's CRA, preemployment conduct is actionable, but it is not actionable

under the WPA, in which "employee" is specifically defined. Merely because "adverse employment action" is treated the same under the CRA and the WPA, it does not follow that actions specifically prohibited by the CRA are somehow merged into the WPA. If the Legislature intended to include preemployment or failure to rehire conduct as actionable under the WPA—as it has done in the CRA—it would have. "A court may not engraft on a statutory provision a term that the Legislature might have added to a statute but did not." *People v Kern*, 288 Mich App 513, 522; 794 NW2d 362 (2010). It is simply not within this Court's province to do so. As our Supreme Court stated in *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012), this type of policy argument

> is directed at the wrong branch of government. This Court only has the constitutional authority to exercise the "judicial power." Const 1963, art 6, § 1. "[O]ur judicial role 'precludes imposing different policy choices than those selected by the Legislature . . . .' " *Robertson v Daimler-Chrysler Corp*, 465 Mich 732, 759; 641 NW2d 567 (2002), quoting *People v Sobczak-Obetts*, 463 Mich 687, 694-695; 625 NW2d 764 (2001). "Whether or not a statute is productive of injustice, inconvenience, is unnecessary, or otherwise, are questions with which courts . . . have no concern." *Voorhies v Recorder's Court Judge*, 220 Mich 155, 157; 189 NW 1006 (1922) (quotation marks and citation omitted). "It is to be assumed that the legislature . . . had full knowledge of the provisions . . . and we have no right to enter the legislative field and, upon assumption of unintentional omission . . . , supply what we may think might well have been incorporated." *Reichert v Peoples State Bank*, 265 Mich 668, 672; 252 NW 484 (1934). [Alteration in original.]

Plaintiff's claim fails as a matter of law because no adverse employment action was taken during his 10 years of employment.

IV. CONCLUSION

Plaintiff's claim that defendants' failure to rehire him is not cognizable under the WPA. The majority has used creative law to support a policy-driven conclusion. Regardless of the public policy considerations, this Court is bound by the clear and unambiguous language of the WPA, which requires the existence of an employment relationship and an adverse action within the context of that employment relationship. The trial court correctly granted summary disposition in defendants' favor and I would affirm.

PEOPLE v SANDERS (AFTER REMAND)

Docket No. 303051. Submitted August 28, 2012, at Lansing. Decided October 2, 2012, at 9:10 a.m.

Robert S. Sanders pleaded guilty in the Berrien Circuit Court, Angela M. Pasula, J., of delivery of less than 50 grams of heroin, second offense. He was sentenced to 23 months to 40 years in prison, a $100 fine, $1,000 in court costs, a $60 victim's rights fee, and $68 in state costs. He appealed the imposition, pursuant to MCL 769.1k(1)(b)(*ii*), of the $1,000 in court costs, arguing that the court had failed to establish a factual basis for the amount of costs imposed. The Court of Appeals, WHITBECK, P.J., and SAWYER and HOEKSTRA, JJ., concluded that the imposition of costs was authorized by the statute and affirmed that part of the trial court's judgment. The Court of Appeals also concluded that the trial court could impose a generally reasonable amount of court costs and that the costs need not be individually calculated to reflect the costs involved in a particular case. However, the Court of Appeals determined that the trial court had not established an adequate basis to use the $1,000 figure and, while retaining jurisdiction, remanded the matter to the trial court for it to establish the reasonableness of the amount imposed. 296 Mich App 710 (2012). On remand, the trial court considered the evidence submitted and determined that the average cost of handling a felony case in the circuit court was, conservatively, $2,237.55 and that cases could cost as much as $4,846 each. Because the most conservative estimate exceeded by far the $1,000 amount imposed, the trial court held that there was a reasonable relationship between the costs imposed and the actual costs incurred by the trial court.

After remand, the Court of Appeals *held*:

A trial court, whether the case is resolved quickly by a plea or at the conclusion of a lengthy trial, may impose costs without the necessity of separately calculating the costs involved in the particular case. The trial court, on remand, complied with the directives of the Court of Appeals and did establish a sufficient factual basis to conclude that $1,000 in court costs under MCL 769.1k(1)(b)(*ii*) is a reasonable amount in a felony case in the Berrien Circuit Court.

Affirmed.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Arthur J. Cotter*, Prosecuting Attorney, and *Elizabeth A. Wild*, Assistant Prosecuting Attorney, for the people.

John W. Ujlaky for defendant.

AFTER REMAND

Before: WHITBECK, P.J., and SAWYER and HOEKSTRA, JJ.

SAWYER, J. This matter is again before us following a remand to the trial court to determine the factual basis for the amount of court costs imposed. As part of defendant's sentence, the trial court ordered the payment of $1,000 in court costs. Defendant's sole issue on appeal was a challenge to those costs, arguing that the trial court had failed to establish a factual basis for the amount of costs imposed. We affirmed the trial court's authority to impose court costs, concluding that the trial court could impose a generally reasonable amount of court costs and that those costs need not be individually calculated to reflect the costs involved in a particular case.[1] We were not, however, persuaded that the trial court had established an adequate basis to use the $1,000 figure.[2] We remanded the matter to the trial court to establish the reasonableness of the amount imposed. We emphasized that the amount of costs was not to be particularized in an individual case, but the court was to "factually establish the reasonable costs figure for felony cases in the Berrien Circuit Court, while affording defendant the opportunity to challenge that determination."[3]

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[1] *People v Sanders*, 296 Mich App 710, 715; 825 NW2d 87 (2012).

[2] *Id.*

[3] *Id.* at 716.

On remand, the trial court conducted the hearing as directed and received evidence of the cost of processing a felony case in the Berrien Circuit Court. After considering the financial data submitted by the county, the trial court determined that the average cost of handling a felony case was, conservatively, $2,237.55 a case and, potentially, cases could cost as much as $4,846 each. Therefore, the trial court concluded that, because even the most conservative estimate of the cost of processing a felony far exceeded the $1,000 amount of costs imposed, there was "a reasonable relationship between the costs imposed and the actual costs incurred by the trial court."[4]

Defendant's argument in the trial court against the trial court's determination appears primarily to have been a continued objection to the trial court's failure to assess costs on the basis of the actual expenditure of time and money in a particular case. Defendant, in particular, argued for recognition of the distinction between the time invested in resolving a case by a plea and the time invested in conducting a trial, or, for that matter, between the time involved in a one-day trial and that involved in a three-day trial. But, as the trial court observed in its opinion, defendant was repeating an argument that we had already rejected in our earlier opinion: that the costs imposed have to be particularized to the case before the court. As we thought we had made clear in our original opinion, a trial court may impose costs "without the necessity of separately calculating the costs involved in the particular case"[5] and that is true whether a case is quickly resolved by a plea or at the conclusion of a lengthy trial.

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[4] *Id.* at 714.

[5] *Id.* at 715.

Indeed, we would be hesitant to uphold an approach that would take into account whether the case was resolved by a plea or by a trial. If we embraced defendant's argument that costs should be less in a case resolved by a plea that only took "25 minutes of court time" rather than by a trial, there would be a realistic concern that we would be penalizing a defendant for going to trial rather than pleading guilty. That is, a system where greater costs were imposed on a defendant who went to trial rather than plead guilty or nolo contendere would create a financial incentive for a defendant to plead rather than face the possibility of even greater court costs being imposed for exercising his or her constitutional right to a trial.

In any event, we are satisfied that the trial court complied with our directives on remand and did establish a sufficient factual basis to conclude that $1,000 in court costs under MCL 769.1k(1)(b)(*ii*) is a reasonable amount in a felony case conducted in the Berrien Circuit Court.

Affirmed.

WHITBECK, P.J., and HOEKSTRA, J., concurred with SAWYER, J.

LATITS v PHILLIPS

Docket No. 304236. Submitted August 7, 2012, at Detroit. Decided August 21, 2012. Approved for publication October 9, 2012, at 9:00 a.m.

Debbie Jean Latits, as personal representative of the estate of Laszlo J. Latits, brought an action in the Wayne Circuit Court against Ferndale police officer Lowell Phillips, alleging assault and battery and gross negligence in connection with the police chase and shooting that caused Latits's death. Latits, who had been pulled over for a traffic violation, fled in his vehicle when the officer who stopped him noticed illegal drugs in his glove compartment. After Latits drove into one of the patrol cars that were attempting to stop his vehicle, defendant shot Latits, who later died from his wounds. Defendant moved for summary disposition under MCR 2.116(C)(7) on the basis of governmental immunity. The court, Susan D. Borman, J., denied the motion on the ground that there were factual questions regarding whether defendant had probable cause to detain Latits. Defendant appealed.

The Court of Appeals *held*:

1. Plaintiff's argument that defendant may not rely on police reports to support his motion for summary disposition was without merit. While a motion for summary disposition must be supported by admissible evidence, the evidence need not be in admissible form. Apart from the fact that the police reports might have been admissible under MRE 803(6) or (8), defendant offered the police reports for the officers' personal observations, about which the officers could have testified at trial.

2. Defendant was entitled to governmental immunity for the assault and battery claim because the acts in question were (1) undertaken during the course of employment and he was or reasonably believed he was acting within the scope of his authority, (2) undertaken in good faith or not with malice, and (3) discretionary as opposed to ministerial. Whether defendant exercised poor judgment or was mistaken that he was justified in using deadly force was irrelevant to this analysis, as was whether defendant had probable cause to arrest or detain the decedent. Defendant's stated reason for firing his weapon was to ensure his

safety and the safety of others, this reason was supported by the testimony in the police reports, and plaintiff offered no evidence to support a finding of malice. The significance of the discrepancy between defendant's testimony that he fired four shots and the fact that seven shell casings from defendant's gun were found at the scene was merely speculative.

3. Plaintiff's allegations of gross negligence do not defeat defendant's claim of governmental immunity. Although defendant would not have been entitled to governmental immunity for conduct that amounted to gross negligence that was the proximate cause of the injury or damage, the gravamen of plaintiff's complaint was that defendant intentionally and improperly shot Latits. Intentional torts may not be transformed into claims of gross negligence by artful pleading.

Reversed and remanded for entry of an order of summary disposition in favor of defendant.

1. EVIDENCE — ADMISSIBILITY OF EVIDENCE — SUMMARY DISPOSITION.

Evidence offered to support a motion for summary disposition must be substantively admissible but need not be in admissible form (MCR 2.116[G][6]).

2. GOVERNMENTAL IMMUNITY — GOVERNMENTAL EMPLOYEES — TORTS — INTENTIONAL TORTS — USE OF DEADLY FORCE.

A governmental employee is entitled to immunity from suit for intentional torts based on acts that were (1) undertaken during the course of employment if the employee was or reasonably believed he or she was acting within the scope of his or her authority, (2) undertaken in good faith or not with malice, and (3) discretionary as opposed to ministerial; whether a governmental employee who used deadly force exercised poor judgment in doing so or was mistaken that the use of deadly force was justified is irrelevant to whether that employee is entitled to immunity from suit (MCL 691.1407[2]).

3. GOVERNMENTAL IMMUNITY — GOVERNMENTAL EMPLOYEES — TORTS — INTENTIONAL TORTS — PLEADINGS.

Whether the gravamen of an action involves an intentional tort or negligence is determined by considering the entire claim; a claim based on an intentional tort may not be transformed by artful pleading into a claim of gross negligence in order to avoid a defense of governmental immunity (MCL 691.1407[2]).

Kevin Ernst for plaintiff.

Cummings, McClorey, Davis & Acho, P.L.C. (by *Karen M. Daley* and *T. Joseph Seward*), for defendant.

Before: SAAD, P.J., and SAWYER and CAVANAGH, JJ.

PER CURIAM. Defendant Lowell Phillips, a police officer for the city of Ferndale, appeals an order of the circuit court denying his motion for summary disposition of claims arising from the death of motorist Laszlo J. Latits under MCR 2.116(C)(7). We reverse and remand.

While the parties disagree over many of the factual details and the interpretation of various facts, the basic facts needed to resolve this matter are undisputed. The events that gave rise to this action began with a routine traffic stop of Latits's vehicle by Ferndale Police Officer Ken Jaklic. Latits initially stopped as directed. When Latits opened his glove compartment, presumably to retrieve his registration and proof of insurance, Jaklic observed a bag of marijuana. Jaklic ordered Latits out of the vehicle. Instead of complying, Latits took off in his vehicle, with Jaklic giving chase. The chase was soon joined by three other patrol cars, including defendant's.

The videos taken by the patrol cars' dashboard cameras show Latits fleeing from and eluding the police, even after the officers attempted a PIT maneuver.[1] Eventually, Latits drove into a parking area in Detroit near the State Fairgrounds. The four police

[1] According to defendant's deposition testimony, a PIT (precision intercept technique) is a maneuver in which an officer giving chase pushes the rear fender of the suspect's vehicle with the patrol car's opposite front fender, causing the suspect's vehicle to spin out of control and come to a stop. In this case, the video evidence shows Latits' vehicle fishtailing on the wet pavement, but the PIT did not immediately end the chase.

officers attempted to box in Latits' vehicle. Latits, still attempting to evade capture and drive off, rammed one of the patrol cars.[2]

Defendant left his vehicle and approached Latits's vehicle from the passenger side with his weapon drawn. As Latits continued to attempt to evade capture by driving backwards, defendant fired four times.[3] Shortly thereafter, Latits's vehicle came to a stop. Latits was arrested and transported to the hospital, where he later died from three gunshot wounds to the arm, chest, and abdomen. The autopsy also disclosed the presence of alcohol and hydrocodone in Latits's system.

In his deposition, defendant described his decision to shoot as follows:

> I was involved in a pursuit, I was informed by two officers of attempted ramming and ramming. When I got out of my vehicle, I observed him ram the officer, Officer Jaklic. As I approached his vehicle, I could hear the engine revving, he looked back over his shoulder directly at me. As he started moving I felt fear for my life, I wasn't -- I wasn't sure as to how -- how much room I had between his vehicle and my vehicle. I fired to ensure my own safety and the safety of my fellow officers.

(It should be noted that the reference to ramming Jaklic is actually to ramming Jaklic's patrol car while Jaklic was still in the vehicle.)

Plaintiff Debbie Jean Latits, personal representative of Latits's estate, filed a complaint, alleging a claim of

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[2] The police reports also describe other attempts by Latits to ram the police cars involved.

[3] The exact details of the firing of the shots is somewhat unclear. In his deposition, defendant described firing a four-round burst and stated that he did not fire any more shots. However, seven shell casings that matched the casings from defendant's firearm were recovered at the scene. None of the other officers discharged their weapons.

gross negligence and a claim of assault and battery. Defendant thereafter moved for summary disposition on the basis of governmental immunity. The trial court denied the motion with only brief explanation, stating that there were "issues of fact here" and that the videos were "very interesting and very troubling."

The relevant standard of review was summarized by the Supreme Court in *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008):

> We review de novo a trial court's determination regarding a motion for summary disposition. Under MCR 2.116(C)(7), the moving party is entitled to summary disposition if the plaintiff's claims are barred because of immunity granted by law[.] The moving party may support its motion for summary disposition under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence, the substance of which would be admissible at trial. The contents of the complaint are accepted as true unless contradicted by the evidence provided. [Citations and quotation marks omitted.]

We begin by noting that this passage addresses plaintiff's argument that defendant's motion for summary disposition cannot be supported by factual statements from police reports because police reports are inadmissible as evidence at trial. Plaintiff's argument is flawed for two reasons. First, as the quotation alludes to, while a motion for summary disposition must be supported by admissible evidence, that evidence "does not have to be in admissible form." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009); see also *Maiden v Rozwood*, 461 Mich 109, 123-124; 597 NW2d 817 (1999). In this case, defendant's reliance on those reports was in reference to the officers' personal observations, and those officers could have testified at trial to the substance of the

material in the reports. That evidence would be admissible. Second, it is not necessarily the case that those reports would, in fact, be inadmissible at trial. As noted in *Maiden*, 461 Mich at 124-125, police reports are "plausibly admissible" under MRE 803(6), though any secondary hearsay within the documents would not be. They might also be admissible under MRE 803(8). See *In re DMK*, 289 Mich App 246, 258 n 6; 796 NW2d 129 (2010). But, because the officers could testify about their own observations, we need not resolve that issue.

We turn to the question whether defendant was entitled to the protection of governmental immunity under MCL 691.1407(2) for the claim based on the intentional tort of assault and battery. Because this involves a claim against an individual governmental employee rather than a governmental entity, the burden is on defendant to raise and prove immunity as an affirmative defense. *Odom*, 482 Mich at 479. To establish his entitlement to immunity, defendant must show:

> (a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,
>
> (b) the acts were undertaken in good faith, or were not undertaken with malice, and
>
> (c) the acts were discretionary, as opposed to ministerial. [*Id*. at 480.]

Plaintiff concedes the first and third prongs of the test, but argues that defendant was not acting in good faith. We disagree.

The substance of plaintiff's argument is that defendant exercised poor judgment or was mistaken about his justification in using deadly force. But even if we were to agree with plaintiff, it would not affect the

immunity analysis. As the Court explained in *Odom*, showing that an officer made a mistake does not defeat an immunity defense. In *Odom*, the claim was for false imprisonment and malicious prosecution. The trial court denied summary disposition because "there remained a question of fact whether defendant lacked probable cause to detain or arrest plaintiff." *Odom*, 482 Mich at 481. But, as the Court explained, that did not resolve the governmental immunity question:

> The mere existence of probable cause, however, is not the proper inquiry. A police officer would be entitled to immunity under *Ross* [*v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984)] if he acted in good faith and honestly believed that he had probable cause to arrest, even if he later learned that he was mistaken. Yet the existence of probable cause is relevant to the analysis; a claim of false arrest or false imprisonment cannot be sustained if the arrest was legal.
>
> The Court of Appeals held that there remained a question of fact whether defendant's conduct was justified and "objectively reasonable." This objective analysis is also not the proper *Ross* inquiry. The good-faith element of the *Ross* test is subjective in nature. It protects a defendant's honest belief and good-faith conduct with the cloak of immunity while exposing to liability a defendant who acts with malicious intent. [*Id*. at 481-482.]

Thus, while plaintiff would ultimately have to prove that defendant was not justified in using deadly force in order to prevail at trial on her assault and battery claim, this showing is inadequate to defeat the defense of governmental immunity. As long as defendant can show that he had a good-faith belief that he was acting properly in using deadly force, he is entitled to the protections of governmental immunity regardless of whether he was correct in that belief. And there is no evidence in this case to show that defendant did not have such a belief.

Defendant's stated reason for firing his weapon was to ensure his safety and the safety of others. The facts support the conclusion that defendant would have such a reason, and plaintiff presented no evidence to establish any other motivation. Defendant testified in his deposition that he was informed that Latits had rammed and attempted to ram police cars, that there had been a chase, and Latits had engaged in erratic driving. That defendant actually would have had this belief is supported not only by his own testimony, but by the statements of the other officers involved as recorded in the police reports, about which the officers would presumably testify at trial.

Plaintiff, on the other hand, identifies no evidence supporting a finding of malice. Plaintiff spends a good portion of her argument on this point discussing whether the use of deadly force was justified. But the standard in evaluating the governmental immunity question is not whether, when viewing the facts objectively with the benefit of hindsight, the use of deadly force was justified. Rather, as discussed in *Odom*, 482 Mich at 481, the standard is a subjective one from the perspective of defendant with respect to whether he was acting in good faith. Whether the legal standards for acting in self-defense or defense of others was met is not controlling. Whether the information relayed to defendant by the other officers was accurate is not relevant.[4] What is relevant was whether defendant, in good faith, believed that he needed to fire his weapon to protect himself and others.

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[4] In her brief, plaintiff claims that Jaklic and Officer Andrew Wurm falsely radioed that Latits had rammed their vehicles. But even assuming plaintiff's claim to be true, that speaks to those officers' good faith, not defendant's. That is, if defendant heard this information and believed it, the fact that it was false would not establish defendant's malice.

In this regard, we find the United States Supreme Court's opinion in *Brosseau v Haugen*, 543 US 194; 125 S Ct 596; 160 L Ed 2d 583 (2004), somewhat instructive. In that case, police officer Rochelle Brosseau shot the plaintiff in the back as he was attempting to flee in a vehicle. Her stated reason for doing so was her concern for the safety of the other officers on foot in the area, as well as any civilians who might be in the plaintiff's path. *Id*. at 196-197. The plaintiff sued Brosseau under 42 USC 1983. Ultimately, however, the Court declined to determine whether Brosseau employed excessive force under the standards of *Tennessee v Garner*, 471 US 1; 105 S Ct 1694; 85 L Ed 2d 1 (1985), and *Graham v Connor*, 490 US 386; 109 S Ct 1865; 104 L Ed 2d 443 (1989).[5] Rather, it concluded that the established case-law did not "squarely govern[]" the *Brosseau* case and that "Brosseau's actions fell in the 'hazy border between excessive and acceptable force.' " *Brosseau*, 543 US at 201, quoting *Saucier v Katz*, 533 US 194, 206; 121 S Ct 2151; 150 L Ed 2d 272 (2001) (quotation marks omitted). Therefore, the Court concluded that Brosseau was entitled to qualified immunity under 42 USC 1983 because it was not clearly established that her actions violated the Constitution. *Brosseau*, 543 US at 201.

Of course, unlike *Brosseau*, the case at bar does not involve a claim under § 1983 or issues of qualified immunity. But *Brosseau* does provide guidance on two points. First, it draws into question plaintiff's claim that the force was excessive. If Brosseau's actions were on the "hazy border" between acceptable and excessive force, defendant's actions in the case at bar would seem to more clearly fall into the area of acceptable force. Second, and more to the point, if Brosseau's actions,

[5] The United States Court of Appeals for the Ninth Circuit concluded that Brosseau had, in fact, employed excessive force. *Brosseau*, 543 US at 195.

and the circumstances surrounding her decision to shoot Haugen, did not clearly establish excessive force, then the circumstances surrounding defendant's decision to shoot Latits do not establish malice on behalf of defendant.

The closest that plaintiff comes to defeating defendant's claim of acting in good faith is that three rounds apparently fired by defendant are unaccounted for. Defendant has maintained that he fired a single, four-round burst at Latits. Yet seven shell casings were recovered at the scene. But because there is no explanation of the extra three rounds being fired, plaintiff can merely speculate about when those rounds were fired, whether they are the rounds that struck Latits, and what defendant's motivation was in firing those rounds.

In sum, defendant was entitled to summary disposition on the assault and battery claim if he could show that it was uncontroverted that he acted in good faith. Defendant is able to present evidence that he was acting in good faith at the time that he shot Latits. Plaintiff has not identified any contradictory evidence. Therefore, summary disposition should have been granted to defendant on this claim.

We turn next to the issue of plaintiff's gross negligence claim. As discussed in *Odom*, 482 Mich at 479-480, the standard is different for establishing governmental immunity with respect to negligent torts and intentional torts. For negligent torts, the governmental employee is not entitled to the protection of governmental immunity if the "conduct amounted to gross negligence that was the proximate cause of the injury or damage." *Id*. at 480. Paragraph 30 of plaintiff's amended complaint alleges that the following items constitute gross negligence rather than the intentional tort of assault and battery:

> b. Failure to follow proper police procedures;
>
> c. Failure to appreciate that Laszlo J. Latits posed no threat of harm to Defendant Officer or anyone else;
>
> d. Recklessly discharging multiple rounds from Defendant's handgun;
>
> e. Recklessly pointing a gun at or in the direction of Laszlo J. Latits;
>
> f. Fraudulently conspiring to cover-up their gross negligence and/or willful and wanton misconduct by filing false police reports and providing false information to authorities regarding the facts and circumstances surrounding the shooting of Laszlo J. Latits;
>
> g. Any and all additional acts of gross negligence and/or willful and wanton misconduct as may come to be known through the course of this lawsuit.

These allegations do not defeat defendant's claim of governmental immunity. Defendant did not recklessly shoot Latits. There is no claim that Latits was shot as the result of an accidental discharge of defendant's firearm or that defendant otherwise had not intended to shoot Latits. Negligence might have been the proper claim if defendant had unintentionally pulled the trigger or if defendant had been aiming at a different target but accidentally shot Latits instead. But there was nothing negligent or reckless about defendant's decision to point his firearm at Latits and shoot—he did so intentionally.

Furthermore, the claim that defendant failed to appreciate that Latits did not pose a risk of harm may have some bearing on whether defendant made the proper decision to shoot, but it does not alter the fact that it was an intentional decision to shoot. Similarly, any failure to follow procedures would potentially be relevant to the correctness of the decision to shoot, but not whether that decision was intentional. As for the

allegation of a cover-up, because that claim involves events that occurred after the shooting, it cannot establish anything with regard to the shooting itself. The final paragraph contains no substantive allegation whatsoever.

As the Court noted in *Maiden*, 461 Mich at 135, "the gravamen of plaintiff's action is determined by considering the entire claim." That is, plaintiff cannot avoid the protections of immunity by "artful pleading." *Id.* Moreover, "this Court has rejected attempts to transform claims involving elements of intentional torts into claims of gross negligence." *VanVorous v Burmeister*, 262 Mich App 467, 483-484; 687 NW2d 132 (2004).

The gravamen of plaintiff's claim against defendant is that he intentionally and improperly shot Latits. Plaintiff's claim is one of an intentional tort, and no amount of artful pleading can change that fact. And, as discussed earlier, defendant is entitled to the protections of governmental immunity for an intentional tort claim arising from that shooting.

Reversed and remanded to the trial court with instructions to enter an order of summary disposition in favor of defendant on plaintiff's claims against him. We do not retain jurisdiction. Defendant may tax costs.

SAAD, P.J., and SAWYER and CAVANAGH, JJ., concurred.

PEOPLE v WILLIAMS

Docket No. 306917. Submitted August 7, 2012, at Detroit. Decided October 16, 2012, at 9:00 a.m.

Zachary Lowell Williams pleaded guilty in the Oakland Circuit Court of second-degree home invasion, receiving and concealing stolen property worth $1,000 or more but less than $20,000, and larceny of property valued at $200 or more but less than $1,000. Defendant accepted the terms of the plea agreement in exchange for the dismissal of a charge of attempted first-degree home invasion, and an agreement that his minimum sentence would be at the bottom of the sentencing guidelines recommended range. Following a successful motion for resentencing, the court, Rae Lee Chabot, J., sentenced defendant to 29 months to 15 years in prison for the home invasion conviction, 10 months to 5 years in prison for the receiving and concealing stolen property conviction, and 1 year in prison for the larceny conviction. Defendant appealed.

The Court of Appeals *held*:

1. Offense variable 4 (OV 4), MCL 777.34(1)(a), which considers the psychological injury to the victim, should be assigned 10 points if the defendant suffered serious psychological injury that required or may require professional treatment. The failure to seek professional treatment is not conclusive proof of a lack of psychological injury. Assignment of 10 points is appropriate if there is evidence that the victim was fearful during the crime, or was left feeling angry, and was trying to block out the memory of the crime. The trial court properly assessed defendant 10 points for OV 4 because the victim indicated that he felt hurt, violated, and frightened as a result of the offense against him.

2. Prior record variable 1 (PRV 1), MCL 777.51(1)(c), which considers the defendant's prior high-severity felony convictions, should be assigned 25 points if the defendant has one prior high-severity felony conviction. Under MCL 777.50(4)(a)(*i*), assignment to youthful trainee status following a plea of guilty under the Holmes Youthful Trainee Act, MCL 762.11 *et* seq., which is imposed as an alternative to a conventional criminal conviction and sentence, constitutes a conviction when assessing points for PRV 1 of the sentencing guidelines. MCL 777.16f provides that

first-degree home invasion, MCL 750.110a(2), is a class B felony under the sentencing guidelines and under MCL 777.51(2)(a) is thus considered to be a high-severity felony. The court did not err by assessing defendant 25 points for PRV 1 because his assignment to youthful trainee status for his 2005 plea of guilty of first-degree home invasion constituted a conviction for purposes of calculating PRV 1. MCL 777.50(4)(a)(*i*). The statutory definition controls and the trial court properly assessed defendant 25 points for PRV 1.

Affirmed.

1. SENTENCING — SENTENCING GUIDELINES — OFFENSE VARIABLES — PSYCHOLOGICAL INJURY TO VICTIM.

Offense variable 4 (OV 4), MCL 777.34(1)(a), which considers the psychological injury to the victim, should be assigned 10 points if the defendant suffered serious psychological injury that required or may require professional treatment; failure to seek professional treatment is not conclusive proof of a lack of psychological injury; assignment of 10 points is appropriate if there is evidence that the victim was fearful during the crime, or was left feeling angry, and was trying to block out the memory of the crime.

2. SENTENCING — SENTENCING GUIDELINES — PRIOR RECORD VARIABLES — PRIOR CONVICTIONS — HOLMES YOUTHFUL TRAINEE.

The assignment to youthful trainee status following a plea of guilty under the Holmes Youthful Trainee Act, MCL 762.11 *et seq*., which is imposed as an alternative to a conventional criminal conviction and sentence, constitutes a conviction when assessing points for prior record variable 1 of the sentencing guidelines. [MCL 777.50(4)(a)(*i*).]

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Tanya L. Nava*, Assistant Prosecuting Attorney, for the people.

Jonathan B. D. Simon for defendant.

Before: SAAD, P.J., and SAWYER and CAVANAGH, JJ.

PER CURIAM. Defendant appeals the sentence imposed for his plea-based conviction of second-degree home

invasion, MCL 750.110a(3). Defendant also pleaded guilty of receiving and concealing stolen property worth at least $1,000 but less than $20,000, MCL 750.535(3)(a), and larceny of property worth at least $200 but less than $1,000, MCL 750.356(4)(a). Defendant offered his plea in exchange for the dismissal of a charge of attempted first-degree home invasion, plus a *Cobbs*[1] agreement for a minimum sentence at the bottom of the recommended range under the sentencing guidelines. The trial court initially imposed concurrent terms of incarceration of 36 months to 15 years for the home invasion conviction, 18 months to 5 years for the receiving and concealing conviction, and 1 year for the larceny conviction. However, defendant won partial relief in a motion for resentencing, and the trial court reduced defendant's minimum sentences for the home invasion and receiving and concealing convictions, respectively, to 29 and 10 months. On appeal, defendant challenges the scoring of offense variable 4 (OV 4), psychological injury to the victim, and prior record variable 1 (PRV 1), prior high-severity felony convictions. For the reasons set forth below, we affirm.

We review for clear error a sentencing court's factual findings. MCR 2.613(C); *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). However, the proper application of the sentencing guidelines presents a question of law, which we review de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

The trial court assessed 10 points for OV 4, MCL 777.34(1)(a), which should be assigned if "[s]erious psychological injury requiring professional treatment

[1] See *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993).

occurred to a victim." Subsection (2) states that 10 points should be assigned "if the serious psychological injury may require professional treatment," and clarifies that "[i]n making this determination, the fact that treatment has not been sought is not conclusive." Defendant argues that the trial court had no basis to conclude that the victim experienced severe psychological injury as a result of his criminal actions.

The victim of defendant's home invasion submitted a victim impact statement declaring that he felt angry, hurt, violated, and frightened after the crime. We have held that evidence that a victim was left feeling "pretty angry," and "try[ing] to block out the memory," of a crime was adequate to uphold an assessment of 10 points under OV 4. *People v Waclawski*, 286 Mich App 634, 681; 780 NW2d 321 (2009). We have also held that evidence that a victim was "fearful during the encounter with [the] defendant" was sufficient to support such a score. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). The victim's statements about feeling angry, hurt, violated, and frightened support his score under our case law. Accordingly, we hold that the trial court properly assessed 10 points for OV 4. See *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) (noting that a trial court's scoring decision will be affirmed when there is any evidence to support it).

Defendant claims that the trial court incorrectly assessed 25 points for PRV 1 because it erroneously relied on a term he had served under the Holmes Youthful Trainee Act, MCL 762.11 *et seq*. Twenty-five points should be assessed for PRV 1 if the offender has one prior high-severity felony conviction. MCL 777.51(1)(c). First-degree home invasion, MCL 750.110a(2), is a class B felony for purposes of the

guidelines. MCL 777.16f. A class B felony is considered a high-severity felony for the purpose of scoring PRV 1. MCL 777.51(2)(a).

Defendant was adjudged responsible for a first-degree home invasion in 2005, but served a term as a youthful trainee under the Holmes Youthful Trainee Act as an alternative to conventional criminal conviction and sentence. The question presented in this case is whether the assignment of youthful trainee status constitutes a conviction for purposes of scoring PRV 1. MCL 777.50(4)(a)(*i*) provides that when scoring PRVs 1 through 5, " '[c]onviction' includes . . . [a]ssignment to youthful trainee status under [MCL 762.11 through 762.15]." MCL 762.11(1) states as follows:

> [I]f an individual pleads guilty to a criminal offense, committed on or after the individual's seventeenth birthday but before his or her twenty-first birthday, the court of record having jurisdiction of the criminal offense may, without entering a judgment of conviction and with the consent of that individual, consider and assign that individual to the status of youthful trainee.

Because defendant was assigned the status of youthful trainee under MCL 762.11(1) in response to having committed the crime of first-degree home invasion, that crime falls within the definition of "conviction" for a high-severity felony under MCL 777.50(4)(a)(*i*), and thus for the purpose of scoring PRV 1 under MCL 777.51(1)(c).

Defendant relies on *People v Garner*, 215 Mich App 218, 220; 544 NW2d 478 (1996), in which this Court, citing MCL 762.14(2), held that assignment of youthful trainee status did not constitute a conviction for the purpose of scoring the judicial guidelines then in effect. However, *Garner* was decided two years before the Legislature enacted MCL 777.50, subsection (4)(*i*) of

which defines "conviction" to include assignment to youthful trainee status for purposes of scoring PRV 1. See 1998 PA 317.

Subsequent panels of this Court are bound to follow prior decisions of this Court only as required by MCR 7.215(J). In *Colucci v McMillin*, 256 Mich App 88, 97 n 6; 662 NW2d 87 (2003), this Court considered whether it was bound to follow a prior decision of this Court that interpreted a pre-amendment version of MCL 600.1641:

> We recognize that, pursuant to MCR 7.215(I)(1),[2] "[a] panel of the Court of Appeals must follow the *rule of law* established by a prior published decision of the Court of Appeals. . . ." (Emphasis added.) Nonetheless, we conclude we are not bound by MCR 7.215(I)(1) to hold that the present case involves a single cause of action arising from a single vehicular accident that happens to include multiple defendants. *Schultz* [*v Silver Lake Transport, Inc*, 207 Mich App 267, 275; 523 NW2d 895 (1994),] was decided in 1994, before the Legislature amended MCL 600.1641. Therefore, *Schultz* did not consider the meaning of the phrase "cause of action" in MCL 600.1641(2) when the Court concluded that a wrongful-death lawsuit alleging negligence by multiple defendants is a single claim.

Thus, the Court in *Colucci* ruled that when the relevant language of a statute is amended, future panels are bound to hold that MCR 7.215(J) does not require them to adhere to earlier opinions that interpreted the pre-amendment version of the statute.

Moreover, our Supreme Court has consistently held that if a statute specifically defines a term, the statutory definition is controlling. See *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008); *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007).

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[2] This Court rule was later renumbered MCR 7.215(J)(1).

Accordingly, because MCL 777.50(4)(*i*) now specifically defines "conviction" to include assignment of youthful trainee status, that statutory definition must control. The trial court correctly assessed 25 points for PRV 1.

Affirmed.

SAAD, P.J., and SAWYER and CAVANAGH, JJ., concurred.

PEOPLE v JOHNSON

Docket No. 302173. Submitted April 4, 2012, at Detroit. Decided October 16, 2012, at 9:05 a.m. Leave to appeal denied, 493 Mich 970.

Todd C. Johnson was convicted, following a bench trial in the Wayne Circuit Court, Linda V. Parker, J., of three counts of first-degree criminal sexual conduct. He was sentenced to 17½ to 40 years' imprisonment and lifetime electronic monitoring. Defendant appealed.

The Court of Appeals *held*:

1. The trial court did not err by assessing 50 points for offense variable (OV) 11, MCL 777.41, when calculating defendant's recommended minimum sentence range. The record evidence established that two sexual penetrations arose out of the penetrations forming the basis of the sentencing offenses.

2. There was evidence of predatory conduct by defendant used to exploit a vulnerable victim, including giving gifts to the young victim, who was between the ages of 13 and 16, and picking her up in his vehicle. The trial court properly assessed 15 points for OV 10, MCL 777.40.

3. Regardless of the ages of a defendant and the defendant's victim, MCL 750.520b(2) requires lifetime electronic monitoring to be imposed for convictions of first-degree criminal sexual conduct when, as in this case, the defendant has not been sentenced to life in prison without the possibility of parole. Defendant was properly sentenced to lifetime electronic monitoring.

Affirmed.

1. SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 11 — SEXUAL PENETRATIONS.

Vaginal penetration, fellatio, and cunnilingus are considered separate sexual penetrations for purposes of scoring offense variable 11, which addresses criminal sexual penetrations (MCL 777.41).

2. SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 11 — WORDS AND PHRASES — ARISING OUT OF.

The phrase "arising out of" used in the statute regarding the scoring of offense variable 11 (criminal sexual penetrations) refers to

something that springs from or results from something else or has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen; the instruction in the statute to score all sexual penetrations of the victim by the offender arising out of the sentencing offense therefore requires more than the mere fact that the penetrations involved the same defendant and victim in order for them to be considered to have arisen out of the sentencing offense (MCL 777.41[2][a]).

3. SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 10 — WORDS AND PHRASES — PREDATORY CONDUCT.

"Predatory conduct," for purposes of scoring offense variable 10 regarding exploitation of a vulnerable victim, is conduct that occurred before the commission of the scoring offense and that was directed at the victim for the primary purpose of victimization (MCL 777.40[3][a]).

4. CRIMINAL LAW — CRIMINAL SEXUAL CONDUCT — SENTENCES — LIFETIME ELECTRONIC MONITORING.

Regardless of the ages of a defendant and his or her victim, MCL 750.520b(2) requires that a defendant convicted of first-degree criminal sexual conduct who is not sentenced to life in prison without the possibility of parole be sentenced to lifetime electronic monitoring in addition to any other penalty imposed (MCL 750.520n).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Julie A. Powell*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Douglas W. Baker*) for defendant.

Before: WILDER, P.J., and O'CONNELL and WHITBECK, JJ.

WILDER, P.J. Defendant was convicted, following a bench trial, of three counts of first-degree criminal sexual conduct, MCL 750.520b (multiple circum-

stances). Defendant was sentenced to 17½ to 40 years' imprisonment for the convictions. Additionally, defendant's judgment of sentence was amended to order defendant to lifetime electronic monitoring pursuant to MCL 750.520n. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court erred by assessing 50 points for offense variable (OV) 11, MCL 777.41, when calculating defendant's recommended minimum sentence range for his first-degree criminal sexual conduct convictions. We disagree.

"This Court reviews de novo questions of statutory construction." *People v Ryan*, 295 Mich App 388, 400; 819 NW2d 55 (2012). "This Court reviews a trial court's scoring of a sentencing guidelines variable for clear error." *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012). "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Phelps*, 288 Mich App 123, 135; 791 NW2d 732 (2010) (quotation marks and citation omitted). The record evidence the trial court is permitted to consider when calculating the sentencing guidelines includes the contents of the presentence investigation report. *People v Althoff*, 280 Mich App 524, 541; 760 NW2d 764 (2008). This Court will affirm a trial court's decision regarding sentencing scoring when there is evidence existing to support the score. *Id*.

First-degree criminal sexual conduct, MCL 750.520b, is a class A felony against a person. MCL 777.16y. "A scoring decision is not clearly erroneous if the record contains any evidence in support of the decision."

Lockett, 295 Mich App at 182 (quotation marks and citation omitted). "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993). "[If] a defendant has effectively challenged an adverse factual assertion contained in the presentence report or any other controverted issues of fact relevant to the sentencing decision, the prosecution must prove by a preponderance of the evidence that the facts are as asserted." *Id*.

MCL 777.41 governs the scoring of OV 11 and provides as follows:

> (1) Offense variable 11 is criminal sexual penetration. Score offense variable 11 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Two or more criminal sexual penetrations occurred.....50 points
>
> (b) One criminal sexual penetration occurred.....25 points
>
> (c) No criminal sexual penetration occurred.....0 points
>
> (2) All of the following apply to scoring offense variable 11:
>
> (a) Score all sexual penetrations of the victim by the offender arising out of the sentencing offense.
>
> (b) Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 or 13.
>
> (c) Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense.

Vaginal penetration, fellatio, and cunnilingus are considered separate sexual penetrations when scoring OV 11 under MCL 777.41. See *People v Wilkens*, 267 Mich App 728, 743; 705 NW2d 728 (2005). Also, the Michigan Supreme Court has defined "arising out of," as used in MCL 777.41, as something that "springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen." *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006). Accordingly, this standard requires more than the mere fact that the penetrations involved the same defendant and victim. *Id*. at 101-102.

Defendant was charged with and convicted of three counts of first-degree criminal sexual conduct involving vaginal penetration, fellatio, and cunnilingus with the victim "V." V testified that she started having sex with defendant when she was 13 years old and that she has been involved with defendant sexually for three years. The first time sexual relations happened between V and defendant was at defendant's home. V also had sex with defendant at her home. However, V did not recall how many times she had sex with defendant. V stated that defendant put his penis inside her vagina more than one time, beginning when she was 13 years old. Defendant performed cunnilingus on V more than one time, beginning when she was 13 years old. V performed fellatio on defendant more than once. In addition, V's statements in defendant's presentence investigation report indicated that she and defendant engaged in vaginal-penile intercourse almost every time they were together and that they also performed fellatio and cunnilingus during these encounters. Accordingly, because the record evidence establishes that two sexual penetrations arose out of the penetrations forming the basis of the sentencing offenses, OV 11 was properly scored.

II

Next, defendant argues that there is no evidence of predatory conduct, and thus, OV 10, MCL 777.40, should have been scored at 10 points rather than 15 points. We disagree. The trial court must assess 15 points for OV 10 when "[p]redatory conduct was involved" in exploiting a vulnerable victim. MCL 777.40(1)(a). Under MCL 777.40(3)(a), "[p]redatory conduct" is conduct that occurred before the commission of the scoring offense and that was directed at the victim for the primary purpose of victimization. *Lockett*, 295 Mich App at 183. If a victim is young, the victim may be susceptible to physical restraint or temptation by an adult. See *id*. at 184.

The presentence investigation report stated that, according to V, defendant gave her a "minute telephone" so that they could continue to communicate. It also provided that on one occasion, defendant picked V up in his vehicle and took her to his home before having sex with her. Additionally, V's mother testified that there was a time when she noticed that V had received some gifts, including Victoria's Secret underwear, diamond earrings, and a pink cell phone. Furthermore, there is evidence that V's mother discovered that V had received these gifts before an incident in which she found V at defendant's home. V was subsequently interviewed and examined by a nurse. During the interview, V admitted having vaginal intercourse with defendant. The DNA mixture found during the examination of V's vagina matched defendant's DNA. Therefore, V, between the ages of 13 and 16, was arguably vulnerable to the temptation of defendant's gifts and susceptible to physical restraint by defendant because defendant picked her up in his vehicle and took her to his home before having sex with her. See *id*. Further-

more, there is evidence that defendant gave V these gifts before an incident in which he engaged in vaginal intercourse with V. Additionally, the presentence investigation report supports the conclusion that defendant gave V a cell phone so that he could continue to communicate with and have access to her, despite V's mother ordering her not to have contact with defendant. Accordingly, the trial court did not err by finding that defendant's gifts to V and picking V up in his vehicle were predatory conduct used to exploit V, a vulnerable victim, and thus, OV 10 was properly scored at 15 points.

III

Finally, defendant argues that because V was not less than 13 at the time of defendant's offenses, defendant was erroneously sentenced to lifetime electronic monitoring. We disagree.

"Whether defendant is subject to the statutory requirement of lifetime electronic monitoring involves statutory construction, which is reviewed de novo." *People v Kern*, 288 Mich App 513, 516; 794 NW2d 362 (2010). At issue is the proper interpretation of MCL 750.520b(2) and MCL 750.520n(1). Because these statutes "address the same subject and share a common purpose, they are *in pari materia* and must be read together as a unified whole." *People v Brantley*, 296 Mich App 546, 558; 823 NW2d 290 (2012).

MCL 750.520b(2) provides the following

> Criminal sexual conduct in the first degree is a felony punishable as follows:
>
> (a) Except as provided in subdivisions (b) and (c), by imprisonment for life or for any term of years.

> (b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any terms of years, but not less than 25 years.
>
> (c) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age, by imprisonment for life without possibility of parole if the person was previously convicted of a violation of this section or [MCL 750.520c, 750.520d, 750.520e, or 750.520g] committed against an individual less than 13 years of age or a violation of law of the United States, another state or political subdivision substantially corresponding to a violation of this section or [MCL 750.520c, 750.520d, 750.520e, or 750.520g] committed against an individual less than 13 years of age.
>
> (d) In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under [MCL 750.520n].

This section requires three differing prison sentences for first-degree criminal sexual conduct, depending on the circumstances: (1) imprisonment for life or any term of years; (2) imprisonment for life or any term of years, but not less than 25 years, if the defendant is 17 years or older and the victim is less than 13 years of age; or (3) imprisonment for life without the possibility of parole if the defendant was previously convicted of a criminal sexual conduct offense or another attempted criminal sexual conduct offense. The subdivision (d) penalty regarding lifetime monitoring is explicitly required to be imposed *in addition to* the penalties provided in subdivisions (a) and (b). Moreover, the lifetime monitoring penalty specifically does not apply when a defendant is sentenced to prison for life without the possibility of parole under subdivision (c). Thus, we conclude from the plain statutory language that, *regardless of the ages of the defendant and the victim*, MCL 750.520b(2) requires lifetime electronic monitor-

ing for first-degree criminal sexual conduct convictions when the defendant has not been sentenced to life in prison without the possibility of parole.

This interpretation of MCL 750.520b(2) is further supported by MCL 750.520n(1). *Brantley*, 296 Mich App at 558. MCL 750.520n(1) states:

> A person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring . . . .

The *Brantley* Court concluded that, applying the "last antecedent rule" to this section, the phrase "committed by an individual 17 years old or older against an individual less than 13 years of age" only modifies or restricts the immediately preceding antecedent, "520c."[1] *Brantley*, 296 Mich App at 557. As a result, a person convicted under section 520b, regardless of the ages involved, is to be sentenced to lifetime electronic monitoring, and a person convicted under section 520c is to be sentenced to lifetime monitoring only if the defendant was 17 or older at the time of the crime and the victim was less than 13.

Therefore, for all of the above-stated reasons, defendant, having been convicted of first-degree criminal sexual conduct, was properly ordered to submit to lifetime electronic monitoring even though V was not less than 13 years of age, and his claim fails.

Affirmed.

O'CONNELL and WHITBECK, JJ., concurred with WILDER, P.J.

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[1] 520b refers to MCL 750.520b, which addresses first-degree criminal sexual conduct, and 520c refers to MCL 750.520c, which addresses second-degree criminal sexual conduct.

AMERISURE INSURANCE COMPANY v DeBRUYN PRODUCE COMPANY

Docket No. 307128. Submitted August 7, 2012, at Grand Rapids. Decided October 16, 2012 at 9:10 a.m. Leave to appeal denied, 493 Mich 953.

Amerisure Insurance Company brought a declaratory action in the Ottawa Circuit Court, seeking a ruling that it was not liable to its insured, DeBruyn Produce Company, for losses incurred when DeBruyn's controller repeatedly issued herself two paychecks from the payroll account rather than one, resulting in her conviction for embezzlement. DeBruyn's insurance policy with Amerisure provided coverage for dishonest acts committed by an employee with the intent to cause the company to sustain loss and the employee to obtain a financial benefit other than benefits earned in the normal course of employment, including salaries. Amerisure denied DeBruyn's claim on the ground that the unauthorized checks constituted salary and were therefore excluded from the policy's coverage. Both parties moved for summary disposition under MCR 2.116(C)(10). The trial court, Edward R. Post, J., granted summary disposition in favor of DeBruyn, and Amerisure appealed.

The Court of Appeals *held*:

The trial court properly ruled that the insurance policy covered the losses caused when DeBruyn's controller issued herself unauthorized checks from the payroll account. Under the analysis set forth in *Resolution Trust Corp v Fidelity & Deposit Co of Maryland*, 205 F3d 615 (CA 3, 2000), salary exclusions from insurance coverage for employee dishonesty apply only to payments knowingly made by an insured to an employee as a consequence of their employment relationship and in recognition of the employee's performance of job-related duties, and that analysis is persuasive. Although the insurance policy at issue contains no language requiring that the employer have knowingly made the payments to the dishonest employee for the exclusion to apply, that requirement is implied by a natural reading of the types of compensation encompassed by the exclusion, which share that requirement as a unifying characteristic. In this case, DeBruyn did not knowingly or intentionally pay its controller multiple paychecks, the controller

did not pay income tax or other withholding on the unauthorized paychecks, and she was convicted of embezzlement, which courts have held is covered by policies like the one at issue. The fact that the money was stolen from the payroll account rather than the cash register does not render it salary for purposes of the exclusion.

Affirmed.

INSURANCE — COMMERCIAL INSURANCE POLICIES — COVERAGE FOR LOSSES DUE TO EMPLOYEE DISHONESTY — SALARY EXCLUSIONS — EMBEZZLEMENT FROM PAYROLL ACCOUNTS.

A commercial insurance policy that provides coverage for dishonest acts committed by an employee with the intent to cause the company to sustain loss and the employee to obtain a financial benefit but excludes coverage for benefits earned in the normal course of employment, including salaries, excludes only those payments knowingly made by an insured to an employee as a consequence of their employment relationship and in recognition of the employee's performance of job-related duties; the fact that money was embezzled from a payroll account does not render it salary for purposes of contractual exclusions from employee-dishonesty coverage for earned benefits.

Patrick, Johnson & Mott, P.C. (by *John D. Honeyman*), for Amerisure Insurance Company.

Foster Swift Collins & Smith, PC (by *Thomas R. TerMaat* and *Mindi M. Johnson*), for DeBruyn Produce Company.

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM. Amerisure Insurance Company appeals by right the trial court's order ruling that the commercial insurance policy Amerisure sold to DeBruyn Produce Company covered the losses caused when DeBruyn's former controller issued herself unauthorized checks from the payroll account. We affirm, because the

facts in this case do not fall within any exception to coverage under the insurance contract between the parties.

Amerisure sold a commercial insurance policy to DeBruyn. In February of 2010, DeBruyn discovered that its former controller, Jillone Phillips, had been issuing herself unauthorized checks. When doing payroll, Phillips would create a second check to herself for the same amount as her actual payroll check. These additional checks were also paid out of the payroll account. Phillips did not pay taxes or withholding on the additional checks, but simply wrote them for the same net amount as her regular paycheck. Phillips was convicted of embezzlement for this activity.

DeBruyn filed a claim with Amerisure under the "employee dishonesty" portion of the insurance policy. Amerisure denied the claim on the basis that the loss did not constitute the type of employee dishonesty covered by the policy. On September 7, 2010, Amerisure filed a declaratory action, seeking a ruling that it was not liable to DeBruyn on this claim. After both parties moved for summary disposition under MCR 2.116(C)(10), the trial court ruled that Phillips's misconduct did constitute employee dishonesty under the insurance policy and that Amerisure was therefore required to cover DeBruyn's claim. Amerisure now appeals. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

This case revolves around the interpretation of the insurance policy provided to DeBruyn by Amerisure. A number of cases from other jurisdictions have addressed the same or similar contractual language as is found in this policy, but there appears to be no binding precedent.

The insurance policy at issue provides coverage for "employee dishonesty," which it defines as follows:

> "Employee Dishonesty" in paragraph A.2. means only dishonest acts committed by an "employee", whether identified or not, acting alone or in collusion with other persons, except you or a partner, with the manifest intent to:
>
> (1) Cause you to sustain loss; and also
>
> (2) Obtain financial benefit (other than employee benefits earned in the normal course of employment, including: salaries, commissions, fees, bonuses, promotions, awards, profit sharing or pensions) for:
>
> (a) The "employee"; or
>
> (b) Any person or organization intended by the "employee" to receive that benefit.

The parties dispute only whether Phillips's acts fall under the exclusion in subsection (2), which excludes coverage if the financial benefit received by the employee consisted of "employee benefits earned in the normal course of employment." Amerisure first argues that the use of the word "earned" should not be taken to mean that any unearned benefits are covered, but rather as a general descriptor of the type of benefits excluded, i.e., those that are *generally* earned in the normal course of employment. Amerisure correctly points out that if the word "earned" is taken literally, the entire exclusion becomes meaningless. See, e.g., *Hartford Accident & Indemnity Ins Co v Washington Nat'l Ins Co*, 638 F Supp 78, 83 (ND Ill, 1986); *ABC Imaging of Washington, Inc v Travelers Indemnity Co of America*, 150 Md App 390; 820 A2d 628 (2003); contra *Cincinnati Ins Co v Tuscaloosa Co Parking & Transit Auth*, 827 So 2d 765 (Ala, 2002). Amerisure properly observes that there is no need to exclude from coverage benefits that were actually earned, because such ben-

efits would not constitute a loss to the insured in the first place. DeBruyn concedes this point, and does not base its argument on the fact that Phillips did not "earn" her additional checks.

Thus, the controlling question in this case is whether the money taken by Phillips constituted salary or not. Both parties cite the same cases to buttress their arguments. In *ABC Imaging*, an assistant manager was paid $54,832 instead of $2,400 as a result of a data entry error. When asked to pay the money back, he instead fled the premises. The court rejected the employer's argument that the extra money was not salary because it had not been contracted for, holding instead that the term "salary" included unearned funds. *ABC Imaging*, 150 Md App at 400. Besides rejecting the earned/unearned distinction, the court did not address what makes something "salary." However, an employer's accidentally inflating a paycheck is certainly distinguishable from the present case, in which the employee issued herself additional checks without anyone else knowing about or signing them.

In *Hartford*, some of Washington National Insurance Company's agents obtained additional commissions through a complicated scheme. The court held that, when an employee does something dishonest to receive extra commissions, those benefits constitute the type of commissions excluded from coverage by the policy, even though they were not technically earned. *Hartford*, 638 F Supp at 83. The court also distinguished this scheme from the situation in which an employee simply makes unauthorized "loans" to herself from the company:

> As Hartford explains, the last phrase ["other employee benefits earned in the course of employment"] achieves the useful aim of distinguishing the entire part [2] list from those compensation schemes that are generally unearned,

> such as payoffs, embezzlements, and other forms of theft. As an example, one common situation in which courts have found certain losses to be covered by this type of fidelity bond occurs when an employee makes improper "loans" to himself or third parties as part of a scheme to wrongfully acquire funds. These improper "loans" are not even remotely analogous to salaries, commissions, or other forms of employee benefits normally earned in the course of employment. Therefore, they should not be and are not excluded from fidelity bond coverage. [*Id.* at 84 (citations omitted)].

We conclude that Phillips's embezzlement in the instant case more closely resembles the scenario of an employee making an improper "loan" from the company to herself than that of an employee inducing her employer to erroneously issue her a salary check greater than her actual salary.

Both parties cite *Performance Autoplex II Ltd v Mid-Continent Cas Co*, 322 F3d 847 (CA 5, 2003). However, the case is not particularly helpful, even though it is factually similar to the present case. In *Performance Autoplex*, the controller for a car dealership gave herself a raise without obtaining the appropriate authorization from the general partner and general manager.[1] In that case, however, the dealership essentially conceded that the extra money was salary, instead arguing only that the money was not "earned" because it was dishonestly obtained. *Id.* at 857. The *Performance Autoplex* court rejected this approach and so the dealership's failure to deny that the monies constituted salary was fatal to its claim. Moreover, *Performance Autoplex* is distinguishable because in that case the controller simply issued herself a larger than

[1] *Performance Autoplex* also involved the theft of auto parts, which was covered by the insurance policy. *Performance Autoplex*, 322 F3d at 850-851. But it would be very hard to label the theft of physical objects as salary.

usual paycheck. In the present case, Phillips did not merely inflate her normal salary check, a check that in some amount was to be issued. She wrote herself a second check whose issuance had no basis at all. In addition, *Performance Autoplex* is not binding.

In *James B Lansing Sound, Inc v Nat'l Union Fire Ins Co of Pittsburgh*, 801 F2d 1560 (CA 9, 1986), a sales representative used fraudulent sales to collect extra commissions. The court held that the provision excluding salaries and other earned benefits "clearly indicates that National excluded liability for paying fraudulent or dishonest commissions." *Id.* at 1567. Similarly, in *Muni Securities, Inc v Ins Co of North America*, 829 F2d 7 (CA 6, 1987), a trader hid trades and reported false sales to protect her commissions. Because the only benefit sought was commissions, or an enhancement (or mere preservation) of her normal compensation, the court ruled that the policy excluded coverage for the loss. *Id.* at 9-10.

In *R & J Enterprizes v Gen Cas Co of Wisconsin*, 627 F3d 723 (CA 8, 2010), an employee overstated his time worked to the extent that he was paid more than $100,000 that he had not earned. Quoting *Performance Autoplex*'s conclusion that unearned salaries and commissions are still salaries and commissions, the court denied coverage. *Id.* at 727. This conclusion is consistent because overstating time on a time card is very similar to falsifying sales. More interestingly, the court continued to describe the types of employee theft that *are* covered by the policy:

> Among other things, it covers theft by employees through forging checks, fraudulently using employer credit cards, *see Glaser v. Hartford Cas. Ins. Co.*, 364 F.Supp.2d 529, 531-32 (D.Md.2005), embezzlement, *see Universal Underwriters Ins. Co. v. Buddy Jones Ford, Lincoln-*

> *Mercury, Inc.*, 734 So.2d 173, 174 (Miss.1999),[2] stealing from inventory, *see Performance Autoplex II*, 322 F.3d at 850-51, and altering purchase orders to confer a benefit on the selling company. *See Gen. Analytics Corp. v. CNA Ins. Cos.*, 86 F.3d 51, 53-55 (4th Cir.1996). [*Id.*]

In the instant case, Phillips committed a classic act of embezzlement, and it was very similar to forging checks, though she had the authority to write checks on the payroll account.

The case of *Resolution Trust Corp v Fidelity & Deposit Co of Maryland*, 205 F3d 615 (CA 3, 2000), is particularly helpful. In that case, the officers of a company hid a troubled loan to make their company look more valuable so that they would receive more compensation when the company was bought out. After grappling with the meaning of the salary exclusion in the insurance policy, the court concluded that it covered "payments knowingly made by the insured to the employee as a consequence of their employment relationship and in recognition of the employee's performance of job-related duties." *Id*. at 649. Applying this standard the court held that the extra compensation payments fell "squarely within the exclusion . . . whether it be because they are considered a 'bonus,' 'award,' or simply a financial benefit that the employees 'earned in the normal course of employment.' " *Id.*

Amerisure argues that the insurance policy does not contain any language requiring that the employer have knowingly made the payments to the dishonest employee in order for the exclusion to apply. However, that requirement is implied by a natural reading of the types

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[2] In *Universal Underwriters*, a bookkeeper and office manager of the dealership embezzled a total of $233,082 in 175 separate transactions. The insurance company did not argue that the exclusion for salary, commissions, and similar forms of compensation applied.

of compensation encompassed by the exclusion. As the *Resolution Trust* court stated, each of the eight types of compensation listed as being earned in the normal course of business "share the singular characteristic that they are all financial benefits provided knowingly by an insured, in its capacity as an employer, to its employees as a form of compensation and as a result of the employment relationship." *Id.* at 648-649. As Amerisure concedes, the list of types of compensation in the exclusion is not exclusive. To determine what other types of compensation are also excluded from coverage, courts must be able to look at the listed types and divine the unifying characteristics. We find *Resolution Trust* highly persuasive in this regard.[3]

The *Resolution Trust* analysis was also applied in *Klyn v Travelers Indemnity Co*, 273 AD2d 931; 709 NYS2d 780 (2000). In that case, a comptroller allegedly embezzled from a payroll account over which he had sole control by secretly paying himself extra salary, commissions, and bonuses. The court held that summary disposition was improper because according to the complaint, the plaintiff did not knowingly make the payments to the comptroller as compensation, which rendered receipt of the extra funds pure embezzlement that was recoverable under the insurance policy. *Id.* " 'Where the employer does not knowingly pay funds to its employee under the belief that the funds have been honestly earned, but is instead unaware of the employee's receipt of the funds or pays the lost funds for some purpose other than the employee's compensation, the employee has committed pure embezzlement which is

[3] As we have stated, if we read "unearned" as simply meaning "dishonestly obtained," the questioned coverage would always apply and the exclusion would have no meaning. Conversely, if we read "salary" to mean any money received by the employee from the employer, the exclusion would always apply and the coverage would have no meaning.

recoverable under the [policy.]' " *Id.*, quoting *Fed Deposit Ins Corp v St Paul Fire & Marine Ins Co*, 738 F Supp 1146, 1160 (1990), mod on other grounds 942 F2d 1032 (CA 6, 1991).

Moreover, though Amerisure is correct that most of the cases do not view the problem through this lens, *Resolution Trust* nonetheless predicts the outcomes of the other cases with a high degree of accuracy. In *ABC Imaging* the employer wrote the employee a check for too much money. While the court stated that the employer did not "knowingly" make the inflated payment, *ABC Imaging*, 150 Md App at 399, it would be more accurate to say that the employer did not intend to pay the employee more than he had earned. The employer did knowingly make the payment in the amount stated on the check—the check went through the normal channels, and someone other than the recipient signed the check. Because the employer gave the employee the check for the inflated amount, the *Resolution Trust* court would apply the exclusion, as did the *ABC Imaging* court.

Similarly, *Hartford*, *James B Lansing Sound*, *Muni Securities*, and *R & J Enterprizes* all involve employees who fraudulently induced their employers to give them extra salary or commissions. Under *Resolution Trust*, because the employers knew how much they were paying the employees at the time, the exclusion would apply—and indeed each of those courts found that the exclusion applied.

Applying the analytical framework supplied by *Resolution Trust* to the present case, it is clear that the money taken by Phillips was not salary. Her employer did not intend to write her multiple checks. She simply helped herself to money under her control. It was not included in her regular paycheck, and she did not pay

income tax or other withholding on the money. Phillips was convicted of embezzlement, and even cases that Amerisure claims support its position state that embezzlement is covered. *Hartford*, 638 F Supp at 84; *R & J Enterprizes*, 627 F3d at 727; but see *Performance Autoplex*, 322 F3d at 852. The only factor that supports Amerisure's argument is that the money was paid out of the payroll account, but the fact that the account was generally used for payroll does not mean that it could never be put to another purpose. For example, if someone who did not work for the company stole money from the payroll account, no one would suggest that we call it "salary." Phillips's act is not meaningfully distinguishable from that of a cashier taking extra money out of the till. The money should not be considered salary simply because it was stolen from the payroll account instead of a cash register. This conclusion is consistent with all cases cited by both parties, with the only arguable exception being *Performance Autoplex*.

Affirmed.

MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ., concurred.

GAUDREAU v KELLY

Docket No. 304345. Submitted October 9, 2012, at Detroit. Decided October 16, 2012, at 9:15 a.m.

Serge and Claire Gaudreau filed an action in the Oakland Circuit Court against Joseph James Brian Kelly, seeking to enforce a child support order entered in the Canada Superior Court, Province of Quebec, District of Quebec, by Claude Bouchard, J. Plaintiffs, the maternal grandparents, were awarded custody of the minor children in 2009 and defendant was ordered to pay monthly child support. Plaintiffs unsuccessfully attempted to collect the child support from defendant in Canada. Because defendant was then living and working in the United States, plaintiffs sought to register and enforce the Quebec child support order with the Oakland County Friend of the Court, which was denied. Plaintiffs filed the instant action, requesting that that the circuit court declare Quebec a reciprocating state for purposes of the Revised Uniform Reciprocal Enforcement of Support Act, MCL 780.151 *et seq*., register and enforce the Quebec child support order, and require defendant to pay the arrearage. The circuit court, Joan E. Young, J., granted the motion and defendant appealed.

The Court of Appeals *held*:

1. A foreign child support judgment may be enforced under either the principle of comity or the Uniform Interstate Family Support Act, MCL 552.1101 *et seq*.; the standards for relief under either avenue are different and unrelated to each other. The principle of comity is the recognition of one nation for the legislative, executive, or judicial acts of another nation while giving due regard to both the international duty and convenience of such recognition and to the rights of its own citizens or other persons under the protection of the one nation's laws. To determine whether full effect should be given to a judgment of a foreign country on the basis of comity, a court should consider (1) whether there was a full, fair, and impartial trial before the foreign court, (2) whether the party appeared or there was a citation to appear in the foreign court, (3) whether an impartial administration of justice was likely to be secured between the citizens of the foreign country and those of other countries, and (4) whether there was no

evidence of prejudice in the court or the system of laws under which it was sitting or fraud in the procurement of the judgment. If these circumstances are found to exist, the foreign judgment is prima facie evidence of the truth of the matters adjudged. The circuit court correctly exercised jurisdiction on the basis of international comity and properly enforced the Quebec child support order because there was clear evidence substantiating the content of the foreign judgment. The record established that defendant had a fair hearing on the merits in Canada, that he was represented by counsel, and that he had actively participated in the proceeding. Although defendant was not present at the child support hearing, he and his attorney admittedly had notice of the hearing and had responded in writing to plaintiff's motion.

2. The focus of parenting time is to foster a strong relationship between the child and the child's parents. Parenting time is granted if it is in the best interest of the child and in a frequency, duration, and type reasonably calculated to promote strong parent-child relationships. A motion to modify parenting time may be in writing or made orally at any time. The modification of a parenting-time order is governed by the child's best interests. The circuit court did not err by enforcing the Quebec child support order even though defendant was not awarded parenting time in the Quebec order. There is no evidence that defendant requested an award of parenting time in either litigation. A modification of parenting time was not granted because there was no evidence in the record on which to decide the issue, it would have rewarded defendant after the fact for his tactical decision to not raise the issue in either the Quebec or circuit courts, and it would have been unfair to plaintiffs who had no opportunity to address the factual allegations before it was raised for the first time on appeal.

Affirmed.

JUDGMENTS — FOREIGN JUDGMENTS — COMITY — ENFORCEMENT OF CHILD SUPPORT ORDERS.

A foreign child support judgment may be enforced under either the principle of comity or the Uniform Interstate Family Support Act, MCL 552.1101 *et seq*.; the standards for relief under either avenue are different and unrelated to each other; the principle of comity is the recognition of one nation for the legislative, executive, or judicial acts of another nation while giving due regard to both the international duty and convenience of such recognition and to the rights of its own citizens or other persons under the protection of the one nation's laws; to determine whether full effect should be given to a judgment of a foreign country on the basis of comity, a

> court should consider (1) whether there was a full, fair, and impartial trial before the foreign court, (2) whether the party appeared or there was a citation to appear in the foreign court, (3) whether an impartial administration of justice was likely to be secured between the citizens of the foreign country and those of other countries, and (4) whether there was no evidence of prejudice in the court or the system of laws under which it was sitting or fraud in the procurement of the judgment; if these circumstances are found to exist, the foreign judgment is prima facie evidence of the truth of the matters adjudged.

David K. Sucher, P.C. (by *David K. Sucher*), for Serge and Claire Gaudreau.

Robert F. White for Joseph James Brian Kelly.

Before: OWENS, P.J., and TALBOT and WILDER, JJ.

TALBOT, J. In this matter involving the enforcement of a child support order issued in the province of Quebec, Canada, Joseph James Brian Kelly appeals as of right the trial court's order enforcing the Quebec child support order under the principle of international comity. We affirm.

Serge and Claire Gaudreau are the maternal grandparents of the two minor children for whom the Quebec support order was issued. The children began living with the Gaudreaus on July 27, 2008, because neither Kelly nor their daughter, from whom he was divorced in September 2003, was able to care for them. On February 27, 2009, the Superior Court of Canada, Province of Quebec, District of Quebec, granted the Gaudreaus custody of the children and ordered Kelly to pay monthly child support in the amount of $1,005.81 (Canadian dollars). Kelly, however, did not pay his child support and accumulated an arrearage. After unsuccessful attempts to collect child support from Kelly, who had begun to live and work in the United States, the

Gaudreaus hired an attorney in the United States. The Gaudreaus then attempted to register and enforce the Quebec child support order with the Oakland County Friend of the Court. It appears that the Friend of the Court denied their request because the United States and Quebec had not entered into a reciprocity agreement as set forth in the Uniform Interstate Family Support Act (UIFSA).[1] The Gaudreaus then filed a complaint for child support, requesting in pertinent part that the trial court declare Quebec a reciprocating state,[2] register and enforce the Quebec child support order, and require Kelly to immediately pay the arrearage. The trial court subsequently granted the Gaudreaus' complaint for support and found that it had subject-matter jurisdiction to enforce the judgment under the principle of comity.

Kelly argues that because Quebec is not a reciprocating state under the UIFSA, the trial court's reliance on comity to enforce the Quebec child support order violated this state's public policy as contained in the UIFSA. We disagree. Both the trial court's determination that it had subject-matter jurisdiction[3] and that the foreign judgment was appropriately enforced based on the principle of comity[4] are reviewed de novo by this Court. This Court reviews for clear error a trial court's findings of fact.[5] In the application of the clearly erroneous standard, "regard shall be given to the special

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[1] MCL 552.1101 *et seq*.

[2] MCL 780.151 *et seq.* (Revised Uniform Reciprocal Enforcement of Support Act).

[3] *Rudolph Steiner Sch of Ann Arbor v Ann Arbor Charter Twp*, 237 Mich App 721, 730; 605 NW2d 18 (1999).

[4] *Hare v Starr Commonwealth Corp*, 291 Mich App 206, 214; 813 NW2d 752 (2011).

[5] MCR 2.613(C); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

opportunity of the trial court to judge the credibility of the witnesses who appeared before it."[6] "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed."[7]

It is well-settled that the principle of comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws."[8] Comity "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other."[9] To determine whether a court should give full effect to a judgment of a foreign country on the basis of comity, the following factors should be applied:

> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court[] or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an

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[6] MCR 2.613(C).

[7] *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

[8] *Dart v Dart*, 460 Mich 573, 580; 597 NW2d 82 (1999) (citation and quotation marks omitted).

[9] *Hilton v Guyot*, 159 US 113, 163-164; 16 S Ct 139; 40 L Ed 95 (1895).

> appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.[10]

Before comity is invoked and a final decision is imposed on a party, "it is the paramount duty of the court before which any suit is brought to see to it that the parties have had a fair and impartial trial[.]"[11] As explained by our country's Supreme Court:

> When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court having jurisdiction of the cause and of the parties, and upon due allegations and proofs and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that by the principles of international law and by the comity of our own country it should not be given full credit and effect.[12]

In this case, the trial court found that it had been presented with "clear and formal pleadings of record filed in the Quebec court." The trial court specifically held that "[i]t is evident from the February 27, 2010 [sic] Order in Quebec, Canada that [Kelly] had a fair hearing on the merits and that he was represented by counsel, and actively participated in the proceeding." The Quebec order is signed by the Honorable Claude

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[10] *Dart*, 460 Mich at 581, quoting *Hilton*, 159 US at 202-203 (quotation marks omitted).

[11] *Hilton*, 159 US at 205.

[12] *Id*. at 205-206.

Bouchard, dated February 27, 2009, and is part of the lower court record. The Quebec order notes that the Quebec court was in receipt of the Gaudreaus' motion for custody and child support. The Quebec order also indicates that it had received Kelly's response. The Quebec order further states that on January 28, 2009, Kelly had been ordered to appear at the hearing regarding the Gaudreaus' motion that took place on February 23, 2009.

Kelly testified that he was aware of the proceedings in Quebec and that he had retained an attorney to represent him in those proceedings. Although neither Kelly nor his attorney were present at the hearing, there is documentary evidence that both Kelly and his attorney had notice of the hearing in Quebec regarding child support and Kelly's attorney responded to the Gaudreaus' motion. At the instant evidentiary hearing, Kelly testified that there was nothing that had prevented him from appearing at the hearing other than "the hardship of getting there." Clearly, Kelly had every opportunity to take part in the hearing and defend against the Gaudreaus' allegations.

Regarding the calculation of benefits, the Gaudreaus' Canadian attorney, Sandra Armanda, sent a series of letters to Kelly's Canadian attorney and those letters are part of the record. Appended to the letters are the Quebec regulations regarding the determination of child support, including a schedule I form for Kelly to use to calculate his own child support under the Canadian regulations, and a schedule II form, which is the basic parental contribution determination table. At the evidentiary hearing in the instant case, Armanda testified at length and with specificity regarding how she had calculated the child support number using Kelly's W-2, the children's mother's income, the Quebec child

support schedules, and a conversion from American dollars to Canadian dollars and submitted them to the Quebec court. At the evidentiary hearing, Kelly confirmed the annual income reported on his W-2. Armanda also provided information regarding Quebec's child support collection procedures in the event child support is not timely paid.

The record here contains ample evidence substantiating the content of the foreign judgment.[13] In fact, in the trial court and on appeal, Kelly does not challenge the veracity of the proceedings in the Quebec court, notice or his opportunity to respond, custody of his minor children, or how the monthly child support obligation had been calculated and established. Kelly instead seeks to overlay the "substantially similar" requirement of the UIFSA[14] on the principle of comity. Kelly conflates the issues and misapprehends the fact that enforcement of a foreign judgment by a circuit court can be achieved under either theory but under vastly different, completely unrelated standards. Based on the clear evidence substantiating the content of the foreign judgment, we find that the trial court correctly exercised jurisdiction on the basis of international comity and properly enforced the Quebec child support order.[15]

Kelly next argues that the trial court's enforcement of the Quebec child support order was in error because the order failed to award him any parenting time. We disagree. Because Kelly raises this issue for the first time on appeal, this issue is unpreserved.[16] "Issues

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[13] *Id*.

[14] MCL 552.1104(f).

[15] *Snyder*, 239 Mich App at 456.

[16] *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

raised for the first time on appeal are not ordinarily subject to review."[17] That notwithstanding, although appellate review of parenting-time orders is de novo, this Court must affirm the trial court unless its findings of fact were "against the great weight of the evidence," the court "committed a palpable abuse of discretion," or the court made "a clear legal error on a major issue."[18]

"[T]he focus of parenting time is to foster a strong relationship between the child and the child's parents."[19] "Parenting time is granted if it is in the best interest of the child and in a frequency, duration, and type reasonably calculated to promote strong parent-child relationships."[20] The child's best interests[21] govern the modification of parenting-time orders.[22]

There is no evidence in the record that Kelly ever requested parenting time with his children before the Quebec court or the trial court. Kelly admits in his brief on appeal that he raises the issue for the first time before this Court. Kelly was not required to file a written motion to modify parenting time.[23] Rather, an oral motion to modify parenting time made by Kelly "at any time" would have sufficiently placed the issue before the trial court.[24] Because Kelly never made such a request during the course of either litigation, he failed

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[17] *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

[18] MCL 722.28; *Borowsky v Borowsky*, 273 Mich App 666, 688; 733 NW2d 71 (2007).

[19] *Shade v Wright*, 291 Mich App 17, 29; 805 NW2d 1 (2010).

[20] *Brown v Loveman*, 260 Mich App 576, 595; 680 NW2d 432 (2004), citing MCL 722.27a(1).

[21] MCL 722.23; MCL 722.27a(6).

[22] *Shade*, 291 Mich App at 31.

[23] *Pickering v Pickering*, 268 Mich App 1, 6-7; 706 NW2d 835 (2005); MCR 2.119(A)(1).

[24] *Pickering*, 268 Mich App at 7; MCR 2.119(A)(1); MCL 722.27a(7).

to develop any reviewable record in the lower courts. In deciding whether to modify parenting time, a trial court is required to make findings regarding the best-interest factors.[25] Because there is absolutely no record to review, modifying parenting time on this record is impossible. Also, linking a parenting-time determination to the decision to enforce the Quebec child support order would only reward Kelly after the fact for his tactical decision not to raise the issue. Moreover, it would be blatantly unfair to address this issue because the Gaudreaus did not have the opportunity to factually respond to Kelly's allegations raised for the first time on appeal. Thus, relief is not warranted.[26]

Affirmed.

OWENS, P.J., and WILDER, J., concurred with TALBOT, J.

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[25] *Shade*, 291 Mich App at 31-32.

[26] *Borowsky*, 273 Mich App at 688.

WESCOTT v CIVIL SERVICE COMMISSION

Docket No. 302524. Submitted October 9, 2012, at Marquette. Decided October 18, 2012, at 9:00 a.m.

Larry Wescott filed a petition in the Delta Circuit Court, seeking judicial review of a final decision of the Civil Service Commission (CSC), which had affirmed the denial of Wescott's application for long-term disability (LTD) benefits. Wescott, a long-time state employee, began experiencing blurred vision in 2007 that allegedly compromised his ability to drive and read. Wescott applied for nonduty disability retirement benefits, social security disability benefits, and LTD insurance benefits. Both the State Employees' Retirement System Board, which administers nonduty disability retirement benefits, and the Social Security Administration found Wescott disabled, while the third-party administrator of Wescott's LTD benefits plan concluded that he was not entitled to LTD benefits. Wescott began a lengthy administrative appeals process with regard to the LTD benefits that ended with the CSC's decision to affirm the denial of LTD benefits. Wescott sought judicial review of the CSC's decision. The court, Stephen T. Davis, J., reversed the decision of the CSC and ordered that Wescott receive LTD benefits retroactive to his original claim. The CSC appealed by leave granted.

The Court of Appeals *held*:

Circuit court review of a decision of the CSC is governed by the constitutional standard for review of administrative decisions. Under the Constitution, all final decisions, findings, rulings, and orders of any administrative officer or agency existing under the Constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, are subject to direct review by the courts as provided by law. The review must include, at a minimum, the determination whether the final decisions, findings, rulings, and orders are authorized by law, and, in cases in which a hearing is required, whether they are supported by competent, material, and substantial evidence on the whole record. Appellate review of a circuit court's review of a decision of the CSC requires the appellate court to determine whether the circuit court applied correct legal principles and whether it misapprehended or grossly

misapplied the substantial-evidence test to the agency's factual findings. In a proceeding in which a hearing was not required, neither court may review the evidentiary support of the administrative agency's determination; rather, the decision is reviewed for whether it was authorized by law. Decisions that are not authorized by law include those that violate a statute or the Constitution, those that are in excess of statutory authority or an agency's jurisdiction, those that are made upon unlawful procedures that result in material prejudice, and those that are arbitrary and capricious. A ruling is arbitrary and capricious when it lacks an adequate determining principle, when it reflects an absence of consideration or adjustment with reference to principles, circumstances, or significance, or when it is freakish or whimsical. The CSC, the Social Security Administration, and the State Employees' Retirement System Board are independent governmental agencies that employ their own separate standards and criteria in determining whether an applicant qualifies for benefits. The agencies also have their own procedures, processes, rules, and regulations for gathering and analyzing information, for making determinations, and for challenging agency findings. In deciding whether an applicant has qualified for LTD insurance benefits, the CSC is not required to consider the disability findings of the Social Security Administration or the State Employees' Retirement System Board regarding that applicant. In this case, contrary to the decision of the circuit court, the CSC was not required to consider the decisions of the other agencies, and thus the CSC's decision was not arbitrary and capricious. The circuit court improperly reversed the CSC.

Reversed; decision of the CSC reinstated.

CIVIL SERVICE — CIVIL SERVICE COMMISSION — LONG-TERM DISABILITY INSURANCE BENEFITS — DISABILITY FINDINGS OF OTHER GOVERNMENTAL AGENCIES.

In deciding whether an applicant has qualified for long-term disability insurance benefits, the Civil Service Commission is not required to consider the disability findings of the Social Security Administration or the State Employees' Retirement System Board regarding that applicant.

Nino E. Green for Larry Wescott.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Jason Hawkins*, Assistant Attorney General, for the Civil Service Commission.

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM. On appeal from a decision of respondent, the Michigan Civil Service Commission (CSC), the circuit court ruled that the CSC's decision upholding the denial of petitioner, Larry Wescott's, request for long-term disability (LTD) insurance benefits was arbitrary and capricious. This Court granted the CSC's application for leave to appeal, and we hold that the circuit court did not apply correct legal principles in finding that the CSC's ruling was arbitrary and capricious. Accordingly, we reverse the circuit court's ruling and reinstate the CSC's decision.

Petitioner, a longtime state employee, began experiencing blurred vision in 2007 that allegedly compromised his ability to drive and read. Claiming an inability to work because of the impairment, petitioner applied for nonduty disability retirement benefits under MCL 38.24 and for social security disability benefits. Petitioner's separate application for LTD benefits was denied by the third-party administrator (TPA) of the LTD plan, and a lengthy administrative appeals process began.[1] During the pendency of petitioner's LTD appeals, he was found disabled by both the State Employees' Retirement System Board (SERSB), which is charged with administering MCL 38.24, and the Social Security Administration (SSA). After several levels of administrative appeal in which petitioner's request for LTD benefits was repeatedly rejected,[2] a

[1] Under the LTD plan, a claimant is required to submit a medical statement describing "the nature and extent of any disability and explain[ing] why the disabling condition prevents the claimant from performing the duties of the claimant's usual occupation or, after 24 months of total disability, any reasonable occupation."

[2] During the administrative appellate process, petitioner submitted to an independent medical evaluation by an ophthalmologist who opined

final decision of the CSC effectively affirmed the TPA's denial of LTD benefits. Petitioner appealed in the circuit court. The circuit court reversed the CSC's decision and ordered that petitioner receive LTD benefits retroactive to the date of his original claim. The circuit court ruled that the CSC's decision was arbitrary and capricious and constituted an abuse of discretion. The CSC appeals by leave granted.

In *Hanlon v Civil Serv Comm*, 253 Mich App 710, 716; 660 NW2d 74 (2002), this Court stated that the scope of review applicable to a circuit court's review of a decision by the CSC is governed by Const 1963, art 6, § 28, which provides:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.

With respect to our review of the circuit court's ruling, we must determine whether the circuit court " 'applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings.' " *Hanlon*, 253 Mich App at 716 (citation omitted). However,

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that, based on petitioner's present level of visual acuity, he "should easily be able to continue on his job," and that she did "not see any problems that would make it unable [sic] for him to meet the demands of his usual occupation."

because the instant case was not one "in which a hearing [was] required," Const 1963, art 6, § 28, "it is not proper for the circuit court or this Court to review the evidentiary support of [the] administrative agency's determination." *Brandon Sch Dist v Mich Ed Special Servs Ass'n*, 191 Mich App 257, 263; 477 NW2d 138 (1991). "[I]n cases in which no hearing is required, [decisions] are reviewed to determine whether the decisions are authorized by law." *Ross v Blue Care Network of Mich*, 480 Mich 153, 164; 747 NW2d 828 (2008), citing Const 1963, art 6, § 28. Decisions not "authorized by law" include those that violate a statute or the Constitution, those that are in excess of statutory authority or an agency's jurisdiction, those made upon unlawful procedures that result in material prejudice, and those that are arbitrary and capricious. *City of Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 64; 678 NW2d 444 (2003). A ruling is arbitrary and capricious when it lacks an adequate determining principle, when it reflects an absence of consideration or adjustment with reference to principles, circumstances, or significance, or when it is freakish or whimsical. *Id.* at 63-64.

In this case, the circuit court found that the CSC's decision was arbitrary and capricious because the CSC failed to take into consideration or give any weight to the SSA's and the SERSB's conclusions that petitioner was indeed disabled. The circuit court stated that, given its finding that the CSC's decision was arbitrary and capricious, it was unnecessary to examine the sufficiency of the evidentiary foundation for the CSC's decision.[3] Because of the manner in which the circuit

[3] The circuit court had earlier found that due process would have required a hearing in petitioner's case despite the absence of such a requirement in the written procedures relative to a denial of LTD

court framed its ruling, with an emphasis that it was not examining matters pertaining to evidence, the court's ruling must be viewed as one imposing a legal requirement or construct on the CSC in the context of processing LTD benefit requests in order to avoid a finding of arbitrariness or capriciousness, i.e., there must be acknowledgment and consideration of disability findings made by other agencies as part of the analytical framework.[4]

We conclude that the CSC's decision was neither arbitrary nor capricious and that the circuit court used incorrect legal principles in finding to the contrary. We have not been directed to any binding authorities that would require the CSC to consider and discuss the SSA's or the SERSB's disability findings. Even though

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benefits. Accordingly the substantial-evidence test would have applied to the circuit court's examination of the sufficiency of the evidentiary foundation for the CSC's decision. However, the circuit court declined to definitively find a due process violation because of its determination that the CSC's decision was arbitrary and capricious, which made consideration of the substantial-evidence test unnecessary.

[4] We note that the circuit court's ruling, despite the court's contention to the contrary, could be viewed as questioning the evidentiary support for the CSC's decision or dictating what evidence the CSC must entertain in making its ruling, neither of which is allowed, because to do so would exceed the court's scope of review. To the extent that the court's ruling ventured into impermissible territory relative to evidentiary matters, it must be reversed. There would appear to be some tension between the arbitrary-and-capricious standard and the inapplicability of the substantial-evidence test in cases in which no hearing was required, when, for example, there might be an absolute dearth of evidence supporting an agency's decision, which would seem to render the decision completely arbitrary and capricious, yet the rule against examining the evidentiary support for the decision would appear to mandate a holding affirming the decision. In this case, there was evidentiary support for the CSC's decision, even if it was only the ophthalmologist's evaluation. Moreover, it was petitioner that had to establish his right to LTD benefits, and he essentially attempted to do so by simply pointing to the findings of the SSA and the SERSB.

there are some similarities in the functioning and focus of all three agencies, the CSC, the SSA, and the SERSB are nonetheless independent governmental agencies that employ their own separate standards and criteria in determining whether an applicant qualifies for benefits. The agencies also have their own procedures, processes, rules, and regulations for gathering and analyzing information, for making determinations, and for challenging agency findings. See, e.g., note 1 of this opinion; MCL 38.24(1)(b); 42 USC 423(d)(1)(A). If the SSA and the SERSB had denied petitioner's requests for disability benefits and had the CSC taken into consideration or relied on those findings, petitioner would certainly vigorously argue that it was improper to consider the conclusions of outside agencies instead of focusing on the information and evidence presented to the CSC and analyzing said materials under the rules and regulations that govern the CSC. Moreover, this very panel stated in *Davis v Dep't of Corrections*, 251 Mich App 372, 377; 651 NW2d 486 (2002), that "[t]he Civil Service Commission is an administrative agency that exists pursuant to the constitution and is vested with plenary and absolute authority to regulate the terms and conditions of employment in the civil service." Requiring the CSC, in the process of making a determination on a request for LTD benefits, to consider, distinguish, weigh, discuss, or explain away disability decisions rendered by other state agencies and the SSA would improperly encroach on the CSC's constitutional powers.[5]

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[5] We find the federal cases relied on by the circuit court and petitioner to be distinguishable. A major emphasis in those opinions related to the conduct of plan administrators in encouraging, assisting, or requiring an applicant to pursue social security benefits, yet denying benefits to those same applicants under their own plans after social security benefits were awarded. *DeLisle v Sun Life Assurance Co of Canada*, 558 F3d 440, 446

We reverse the circuit court's ruling and reinstate the CSC's decision.

MURPHY, C.J., and SAWYER and HOEKSTRA, JJ., concurred.

(CA 6, 2009) (noting that the plaintiff "was required, not merely encouraged to apply" for social security benefits under the plan); *Bennett v Kemper Nat'l Servs, Inc*, 514 F3d 547, 553 (CA 6, 2008) (noting that the plan administrator had provided the plaintiff "with assistance in obtaining social security disability benefits"); *Glenn v MetLife*, 461 F3d 660, 667 (CA 6, 2006) (noting that the plan administrator had "steered [the plaintiff] to a law firm specializing in securing disability benefits from the Social Security Administration"). Furthermore, those cases did not have the limitation regarding consideration of evidence that is applicable here, nor did they have to ponder the constitutional authority under which the CSC operates, Const 1963, art 11, § 5.

PEOPLE v COLLINS

PEOPLE v MASON

Docket Nos. 300644 and 300645. Submitted October 9, 2012, at Petoskey. Decided October 23, 2012, at 9:00 a.m.

In Docket No. 300644, Stormy Dean Collins was charged in the 95A District Court with the delivery of methylphenidate (Ritalin), MCL 333.7401(2)(b)(*ii*). The charge was filed on the basis of video footage from the Island Resort and Casino, in which Collins was seen handing something to another person from a pill bottle, following an exchange of money. When he was confronted by an officer from the Hannahville Tribal Police Department, Collins admitted that he had sold four Ritalin pills to a person in exchange for money. In Docket No. 300645, Rodney Farrell Mason was charged in the 95A District Court with possession with intent to deliver less than 5 kilograms of marijuana or fewer than 20 marijuana plants, MCL 333.7401(2)(d)(*iii*). Mason was arrested at the Island Resort and Casino after marijuana was found in his possession, following a search of his person. The arrests in both cases occurred at the Island Resort and Casino, which is an Indian casino, operating on Indian lands, in conjunction with a compact between the state of Michigan and the Hannahville Indian Community for the purposes of engaging in class III gaming and authorized by the Indian Gaming Regulatory Act, 25 USC 2701 *et seq*. Neither defendant is of Indian heritage. At the preliminary hearings for each defendant, defense counsel moved to dismiss the charges, arguing that the court lacked jurisdiction over the criminal proceedings. In both cases, the court, Jeffrey G. Barstow, J., denied the motions to dismiss and both defendants were ultimately bound over to the Menominee Circuit Court on their respective charges. In the circuit court, defense counsel renewed the motions to dismiss in both cases on the basis of lack of jurisdiction. The circuit court, Mary B. Barglind, J., granted both defendants' respective motions to dismiss, concluding that the federal government had exclusive jurisdiction over crimes committed on Indian lands by non-Indians against Indians or

where there was no victim. The prosecution appealed in both cases, and the Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. Michigan has statutory territorial jurisdiction over any crime in which any act constituting an element of the crime is committed within Michigan. Jurisdiction over crimes occurring in Indian country is governed by a complex patchwork of federal, state, and tribal law. State courts have exclusive jurisdiction over crimes committed by a non-Indian against a non-Indian in Indian country, as well as over victimless crimes committed by a non-Indian in Indian country. The circuit court erred by dismissing the charges against Collins and Mason because each defendant is a non-Indian, their respective drug offenses were committed on Indian land at the Island Resort and Casino, and the charged crimes were victimless.

2. Under 25 USC 2710(d)(3)(C)(i) and (ii), while a tribal-state compact may include provisions that apply to state criminal laws and allocate criminal jurisdiction between the state and Indian tribe as to the enforcement of laws, the laws must directly relate to, and be necessary for, the licensing and regulation of gaming activities. Collins and Mason were charged with drug offenses. The language of the Hannahville Indian Community-Michigan compact that provides that the casino is not regulated by the state, does not allocate jurisdiction over state drug offenses committed in the casino to the tribe because the drug laws do not relate to, and are not necessary for, the licensing and regulation of gaming activities. The language in the compact did not confer jurisdiction over criminal drug offenses to the tribe.

Reversed and remanded for reinstatement of the charges against both defendants.

1. JURISDICTION — STATE COURTS — CRIMES COMMITTED BY NON-INDIANS ON INDIAN LAND — CRIMES COMMITTED AGAINST NON-INDIAN VICTIM OR VICTIMLESS CRIME.

Michigan has statutory territorial jurisdiction over any crime in which any act constituting an element of the crime is committed within Michigan; jurisdiction over crimes occurring in Indian country is governed by a complex patchwork of federal, state, and tribal law; state courts have exclusive jurisdiction over crimes committed by a non-Indian against a non-Indian in Indian country, as well as over victimless crimes committed by a non-Indian in Indian country.

2. INDIANS — TRIBAL-STATE COMPACTS — ALLOCATION OF CRIMINAL JURISDICTION — LICENSING AND REGULATION OF GAMING ACTIVITIES.

Under 25 USC 2710(d)(3)(C)(i) and (ii), while a tribal-state compact may include provisions that apply to state criminal laws and allocate criminal jurisdiction between the state and Indian tribe as to the enforcement of laws, the laws must directly relate to, and be necessary for, the licensing and regulation of gaming activities.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Louis B. Reinwasser*, Assistant Attorney General, for the people.

Wayne Erickson for Stormy D. Collins and Rodney F. Mason.

Amicus Curiae:

Dawn S. Duncan for the Hannahville Indian Community.

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

MURPHY, C.J. In these consolidated appeals defendant, Stormy Dean Collins, was charged with delivery of a controlled substance, methylphenidate (Ritalin), MCL 333.7401(2)(b)(*ii*) (Docket No. 300644), and defendant, Rodney Farrell Mason, was charged with possession with intent to deliver less than 5 kilograms of marijuana or fewer than 20 marijuana plants, MCL 333.7401(2)(d)(*iii*) (Docket No. 300645). With respect to both defendants, the alleged offenses occurred inside an Indian[1] casino, and there is no dispute that neither defendant is of Indian heritage. Although the district court denied motions by defendants to have the felony

[1] To be consistent with federal statutory terms and the relevant caselaw, we shall, for purposes of this opinion, use the term "Indian" instead of "Native-American."

charges dismissed for lack of territorial jurisdiction, the circuit court, following bindover, granted their renewed motions for dismissal that challenged the court's jurisdiction over the criminal proceedings. The circuit court ruled that Michigan state courts lack jurisdiction over offenses committed by non-Indians that take place on Indian lands situated within the state's boundaries. The circuit court concluded that in such situations federal courts have exclusive jurisdiction. On the basis of opinions issued by the United States Supreme Court, which constitute binding precedent, along with persuasive precedent emanating from numerous state and lower federal courts, we hold that state courts in Michigan have jurisdiction relative to a criminal prosecution in which a non-Indian defendant committed a "victimless"[2] offense on Indian lands or in Indian country. Accordingly, we reverse and remand for reinstatement of the charges against defendants.

Pursuant to a compact between the Hannahville Indian Community (the "tribe") and the state of Michigan (the "state") executed on August 20, 1993, and approved by the United States Department of the Interior on November 19, 1993, and under the authority of the Indian Gaming Regulatory Act, 25 USC 2701 *et seq.*, the tribe operates class III gaming activities on Indian lands at its Island Resort and Casino (the "casino"). See 58 Fed Reg 228 (November 30, 1993) (publishing notice of the federal government's approval of the compact between Michigan and the Hannahville Indian Community for the purpose of engaging in class III gaming); 25 USC 2703(8) (defining "class III gam-

[2] While we are hesitant to describe any drug offense as a "victimless" crime, the terminology is well-suited for purposes of discussing the jurisdictional issue posed to us and is used in other court decisions that we shall discuss later in this opinion.

ing"). With respect to defendant Collins, the prosecution had alleged that on July 2, 2009, as captured by video surveillance, Collins was in the casino, he pulled a pill bottle from his pocket, and he then could be seen handing something to another individual in exchange for money. The video was played at Collins's preliminary examination. At the hearing, Matthew Karaja, a police officer with the Hannahville Tribal Police Department, testified that he had been contacted by the casino's surveillance operator about the suspicious transaction involving Collins. Officer Karaja reviewed the video himself and decided to question Collins, who was still inside the casino. Collins informed Karaja that the pill bottle contained Ritalin that was prescribed for his daughter. On request, Collins gave the pill bottle to Karaja, which indicated on its label that it was a prescription for 60 20-milligram pills of Ritalin; 31 pills remained in the bottle and the prescription had just been filled that day. Collins told Karaja that the other person in the video seen making the purchase gave Collins $50 in exchange for 4 pills.

The preliminary examination for defendant Collins was continued to a later date, during which time Collins's attorney filed a motion to dismiss. Defendant Collins maintained that the district court lacked jurisdiction to adjudicate the criminal charge, given that the alleged offense occurred in an Indian casino, which was outside a state court's territorial jurisdiction. Collins's defense counsel, who also represented defendant Mason, subsequently filed a motion to dismiss in Mason's case, once again arguing that the district court lacked jurisdiction over the criminal proceedings. With respect to defendant Mason, the prosecution had alleged that on December 15, 2009, he was in the casino when police officers searched him and found approximately 3.88 ounces of marijuana in a front pocket of his pants.

According to a lower court brief filed by defense counsel, Mason was caught in a sting operation set up by the county sheriff's department in which Mason was coaxed into going to the casino and purchasing marijuana from a cousin. He was immediately arrested in the casino after the transaction was completed.

At the subsequent hearing on Collins's previously adjourned preliminary examination, the district court also entertained the two motions to dismiss. The district court denied the motions and then found that there was sufficient evidence to bind Collins over to the circuit court on the felony drug charge involving the Ritalin. With respect to the motions to dismiss, the district court first noted that if an Indian commits a serious offense on tribal property, the federal government would have jurisdiction and that if the crime is not serious, the tribal court would have jurisdiction. The district court then ruled that state courts have jurisdiction over non-Indian defendants who commit offenses on tribal property, which was the situation in both cases before the court.

At a later date, defendant Mason waived his right to a preliminary examination and was bound over to the circuit court on the felony drug charge involving marijuana. In the circuit court, defense counsel filed new motions to dismiss on behalf of both defendants, once again arguing that a state court lacked jurisdiction to adjudicate the charges. The circuit court issued a written opinion, concluding that it lacked jurisdiction and dismissing all charges. The circuit court first commented that tribal courts lack jurisdiction relative to a prosecution against non-Indians and that the federal government has exclusive jurisdiction with respect to crimes committed on Indian lands by non-Indians against Indians. The circuit court then ruled:

> In conclusion, this Court can find no authority that gives the State Court jurisdiction for this matter. Since the Tribal Courts clearly do not have jurisdiction either, it would necessarily follow that the Federal Courts have exclusive jurisdiction over these criminal prosecutions. It appears the Federal Government has never chosen to share its jurisdiction over these matters with the State of Michigan. Defendants' Motions for Dismissal are, therefore, granted.

The prosecution appeals as of right.

Questions regarding the exercise of territorial jurisdiction by a state court in a criminal prosecution are reviewed de novo on appeal. See *People v Gayheart*, 285 Mich App 202, 207; 776 NW2d 330 (2009).

"The various courts and persons of this state now having jurisdiction and powers over criminal causes, shall have such jurisdiction and powers as are now conferred upon them by law, except as such jurisdiction and powers may be hereinafter repealed, enlarged or modified." MCL 762.1. Through the enactment of 2002 PA 129, the Michigan Legislature specifically provided that "[a] person may be prosecuted for a criminal offense he or she commits while he or she is physically located within this state or outside of this state if [certain enumerated] circumstances exist." MCL 762.2(*i*). In general, pursuant to MCL 762.2, "Michigan . . . has statutory territorial jurisdiction 'over any crime where any act constituting an element of the crime is committed within Michigan.' " *Gayheart*, 285 Mich App at 209-210, quoting *People v King*, 271 Mich App 235, 243; 721 NW2d 271 (2006). Here, the issue of territorial jurisdiction arises because, although defendants are charged with offenses allegedly committed by them while they were "physically located within the state," the offenses are said to have taken place on Indian lands, i.e., at the tribe's casino. There is no

dispute that the casino is located on Indian lands or in Indian country. See 25 USC 2703(4) (defining the phrase Indian lands); 18 USC 1151 (defining the phrase Indian country).

In *Oneida Co v Oneida Indian Nation of New York*, 470 US 226, 234-235; 105 S Ct 1245; 84 L Ed 2d 169 (1985), the United States Supreme Court observed that "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law."[3] Tribal sovereignty has been recognized by the United States Supreme Court since at least 1832; however, tribal sovereignty, which has a unique and limited character, can be restricted by Congress and " 'exists only at the sufferance of Congress and is subject to complete defeasance.' " *Taxpayers of Mich Against Casinos v Michigan*, 471 Mich 306, 319; 685 NW2d 221 (2004) (citation omitted).

With respect to jurisdictional issues in connection with crimes occurring in Indian country, jurisdiction "is governed by a complex patchwork of federal, state, and tribal law." *Duro v Reina*, 495 US 676, 680 n 1; 110 S Ct 2053; 109 L Ed 2d 693 (1990), superseded by statute on other grounds in 25 USC 1301(2) (stating that an Indian tribe has the inherent power to exercise criminal jurisdiction over all Indians). In the case at bar, we are presented with non-Indian defendants who allegedly committed "victimless" criminal offenses on Indian lands. "Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding

[3] "Congress has broad power to regulate tribal affairs under the Indian Commerce Clause[.]" *White Mountain Apache Tribe v Bracker*, 448 US 136, 142; 100 S Ct 2578; 65 L Ed 2d 665 (1980), citing US Const, art I, § 8, cl 3.

sovereignty of the United States." *Id.* at 693. The *Duro* Court stated that "[f]or Indian country crimes *involving only non-Indians*, longstanding precedents of this Court hold that state courts have exclusive jurisdiction despite the terms of [18 USC] 1152."[4] *Duro*, 495 US at 680 n 1 (emphasis added), citing *New York ex rel Ray v Martin*, 326 US 496[; 66 S Ct 307; 90 L Ed 261] (1946), and *United States v McBratney*, 104 US 621[; 26 L Ed 869] (1881); see also *Draper v United States*, 164 US 240, 243-247; 17 S Ct 107; 41 L Ed 419 (1896) (holding that a federal district court lacked jurisdiction over a criminal prosecution of a non-Indian defendant who

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[4] 18 USC 1152 provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

By using the phrase, "despite the terms of [18 USC] 1152," the Court in *Duro* appeared to suggest that established precedent issued previously by the Court perhaps conflicted with the statute. We decline to engage in an independent analysis interpreting 18 USC 1152, given that we "are bound by the decisions of the United States Supreme Court construing federal law," *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004), and any efforts on our part would therefore be fruitless. Moreover, in *United States v Wheeler*, 435 US 313, 324 n 21; 98 S Ct 1079; 55 L Ed 2d 303 (1978), the Supreme Court stated that 18 USC 1152, which makes federal enclave criminal law generally applicable to Indian country crimes, does not apply, despite its broad language, "to crimes committed by non-Indians against non-Indians, which are subject to state jurisdiction." It is for the United States Supreme Court to revisit the issue concerning the proper construction of 18 USC 1152 should it ever desire to do so, not this intermediate state appellate court.

was charged with murder of a non-Indian on an Indian reservation and that the defendant should be delivered to state authorities for prosecution).

In *United States v Antelope*, 430 US 641, 643 n 2; 97 S Ct 1395; 51 L Ed 2d 701 (1977), the United States Supreme Court explained that "[n]ot all crimes committed within Indian country are subject to federal or tribal jurisdiction . . . [;] a non-Indian charged with committing crimes against other non-Indians in Indian country is subject to prosecution under state law." See also *Williams v United States*, 327 US 711, 714; 66 S Ct 778; 90 L Ed 962 (1946) (noting that state courts have "jurisdiction over offenses committed on [a] reservation between persons who are not Indians," while federal courts would have jurisdiction where a defendant is not an Indian but commits an offense against an Indian). Bearing more specifically on the issue presented here, in *Solem v Bartlett*, 465 US 463, 465 n 2; 104 S Ct 1161; 79 L Ed 2d 443 (1984), the United States Supreme Court noted that, with respect to state criminal jurisdiction within Indian country, the "jurisdiction is limited to crimes by non-Indians against non-Indians, *and victimless crimes by non-Indians*." (Citation omitted; emphasis added.)

Citing cases such as *Duro*, *Solem*, *Antelope*, *Martin*, *Williams*, *McBratney*, and *Draper*, courts from numerous jurisdictions across the country have held that state courts have jurisdiction with respect to criminal prosecutions in cases involving non-Indian defendants who committed offenses on Indian lands against non-Indians or non-Indian defendants who committed offenses described as "victimless" on Indian lands. See, e.g., *United States v Langford*, 641 F3d 1195, 1197-1199 (CA 10, 2011) (stating that there is clearly no federal jurisdiction for a victimless crime committed in Indian

country by a non-Indian because the states possess exclusive criminal jurisdiction over such crimes); *State v Harrison*, 148 NM 500, 505-506; 238 P3d 869 (2010); *People v Ramirez*, 148 Cal App 4th 1464, 1474 n 9; 56 Cal Rptr 3d 631 (2007); *State v Sebastian*, 243 Conn 115, 130 n 24; 701 A2d 13 (1997); *State v VanderMay*, 478 NW2d 289, 290-291 (SD, 1991); *State v Snyder*, 119 Idaho 376, 377-379; 807 P2d 55 (1991); *State v Burrola*, 137 Ariz 181, 182; 669 P2d 614 (Ariz App, 1983). Indeed, we have not been directed to any contrary precedent.

We note that aside from 18 USC 1152, which we discussed earlier in this opinion, there are various federal statutes addressing territorial jurisdiction relative to Indians and Indian country; however, under the circumstances of the charges in this case, those statutes are simply not implicated. See 18 USC 1153 (referred to as the Indian Major Crimes Act, *Duro*, 495 US at 696, the statute gives federal courts exclusive jurisdiction over enumerated serious offenses committed by Indians within Indian country against another Indian or other person); 18 USC 1162 (providing certain identified states, excluding Michigan, with "jurisdiction over offenses committed by or against Indians in the areas of Indian country"); 25 USC 1321 ("The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe . . . .").

Finally, we acknowledge that the compact between the tribe and the state provides, "THIS FACILITY IS NOT REGULATED BY THE STATE OF MICHIGAN." The charges filed against defendants, however, concern criminal drug offenses under a state statute, MCL 333.7401,

that is not regulatory in nature. See *California v Cabazon Band of Mission Indians*, 480 US 202, 209-212; 107 S Ct 1083; 94 L Ed 2d 244 (1987) (distinguishing between state criminal statutes and state regulatory statutes). While a tribal-state compact may include provisions applying to state criminal laws and allocating criminal jurisdiction between the state and Indian tribe as to the enforcement of such laws, the laws must directly relate to, and be necessary for, the licensing and regulation of gaming activities. 25 USC 2710(d)(3)(C)(i) and (ii). The laws at issue here are general drug laws and there are no provisions in the compact suggesting that the parties allocated jurisdiction to the tribe in regard to state drug offenses committed in the casino.

In light of the binding precedent from the United States Supreme Court, and the persuasive precedent issued by numerous state and lower federal courts, we hold that state courts have jurisdiction over the charges brought against defendants in Menominee County and that, in general, state courts in Michigan have jurisdiction over a criminal prosecution in which a defendant is a non-Indian, the offense is committed on Indian lands or in Indian country, and the offense is either victimless or the victim is not an Indian.

Reversed and remanded for reinstatement of the charges against defendants. We do not retain jurisdiction.

SAWYER and HOEKSTRA, JJ., concurred with MURPHY, C.J.

PEOPLE v MICHAEL ANDERSON

Docket No. 301701. Submitted October 10, 2012, at Lansing. Decided October 23, 2012, at 9:05 a.m. Leave to appeal denied, 493 Mich 955.

A jury in the Schoolcraft Circuit Court convicted Michael J. Anderson of arson of a dwelling, MCL 750.72, and acquitted him of two counts of attempted murder, MCL 750.91, for setting fire to the home of his adoptive parents while they slept inside. The court, Mark E. Luoma, J., sentenced him to 10 to 20 years' imprisonment, an upward departure from the minimum sentence range recommended by the sentencing guidelines. Defendant appealed only his sentence.

The Court of Appeals *held*:

1. The trial court properly assessed 10 points for prior record variable (PRV) 6, MCL 777.56, which considers an offender's relationship to the criminal justice system. Under PRV 6, the trial court must assess 10 points if, at the time of the sentencing offense, the offender was on parole, probation, or delayed sentence status and zero points if the offender had no relationship to the criminal justice system. Defendant was on probation for one of his juvenile offenses at the time of the sentencing offense and argued that he thus had no relationship to the criminal justice system. Although proceedings involving juvenile offenders are generally not criminal proceedings, a juvenile adjudication constitutes criminal activity because it amounts to a violation of a criminal statute, even though that violation is not resolved in a criminal proceeding. Juvenile proceedings are closely analogous to the adversarial criminal process. The phrase "criminal justice system" is not limited to adversarial criminal proceedings, but is defined as the collective institutions through which an accused offender passes until the accusations have been disposed of or the assessed punishment concluded, including probation and parole. A juvenile can be placed on probation and can also be incarcerated for violating probation. Accordingly, defendant's prior juvenile adjudications supported the trial court's scoring of this variable.

2. Under the legislative sentencing guidelines, a sentencing court may depart from the appropriate minimum sentence

range if it has a substantial and compelling reason for that departure and states its reasons on the record. In order to be substantial and compelling, the reasons must be objective and verifiable, that is, based on actions or occurrences external to the minds of those involved in the decision and capable of being confirmed. The reasons for departure must also be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention. The court may not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate minimum sentence range unless the court finds from the facts contained in the court record that the characteristic has been given inadequate or disproportionate weight. The trial court must justify on the record both the departure and the extent of the departure. In this case, the trial court erred as a matter of law by concluding that the sentencing guidelines did not account for the fact that defendant had terrorized the victims, and its determination that defendant should have done more to help the victims escape from the fire was not objective and verifiable. However, the departure was supported by other objective and verifiable factors that keenly grabbed the court's attention, including defendant's planning of the crime, the extreme nature of the victims' physical injuries, the victims' unusual level of psychological trauma, defendant's pattern of escalating violence toward the victims, and defendant's inability to benefit from counseling and consequent propensity to reoffend. The court's comments at sentencing, including its comment that any one of those reasons justified an upward departure, supported the conclusion that the court would have departed to the same degree on the basis of the valid reasons alone.

Affirmed.

1. SENTENCES — SENTENCING GUIDELINES — PRIOR RECORD VARIABLE 6 — RELATIONSHIP TO THE CRIMINAL JUSTICE SYSTEM — JUVENILE OFFENSES.

Prior record variable (PRV) 6, MCL 777.56, considers an offender's relationship to the criminal justice system; under PRV 6, the trial court must assess 10 points if, at the time of the sentencing offense, the offender was on parole, probation, or delayed sentence status and zero points if the offender had no relationship to the criminal justice system; juvenile adjudications create a relationship with the criminal justice system, and a sentencing court may assess 10 points for PRV 6 if a defendant was on probation for a juvenile offense at the time of the sentencing offense.

2. SENTENCES — SENTENCING GUIDELINES — DEPARTURES FROM SENTENCING GUIDELINES — OBJECTIVE AND VERIFIABLE FACTORS — ASSISTANCE TO VICTIMS.

Under the legislative sentencing guidelines, a sentencing court may depart from the appropriate minimum sentence range if it has a substantial and compelling reason for that departure and states its reasons on the record; in order to be substantial and compelling, the reasons must be objective and verifiable, that is, based on actions or occurrences external to the minds of those involved in the decision and capable of being confirmed; a determination that a defendant should have done more to help the victims escape the consequences of his or her crime is not objective and verifiable.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, *Peter J. Hollenbeck*, Prosecuting Attorney, and *Elizabeth M. Rivard*, Assistant Attorney General, for the people.

State Appellate Defender (by *Douglas W. Baker*) for defendant.

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM. A jury convicted defendant of burning a dwelling, MCL 750.72, and acquitted him of two counts of attempted murder, MCL 750.91, for setting fire to his parent's[1] home while they slept inside. The trial court sentenced defendant to a prison term of 10 to 20 years. Defendant appeals as of right, raising issues related only to his sentencing. We affirm.

I. PRIOR RECORD VARIABLE 6

Defendant argues that the trial court erred by assessing 10 points for prior record variable (PRV) 6,

[1] Defendant's legal parents are his biological grandfather and stepgrandmother, who adopted him as a child. This opinion refers to them simply as his parents throughout.

MCL 777.56. He contends that zero points should have been assessed for PRV 6. We disagree.

"This Court reviews a trial court's scoring decision under the sentencing guidelines to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) (quotation marks and citation omitted). "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "To the extent that a scoring challenge involves a question of statutory interpretation, this Court reviews the issue de novo." *People v Johnson*, 293 Mich App 79, 84; 808 NW2d 815 (2011).

"PRV 6 considers an offender's relationship to the criminal justice system." *Id.* The trial court is to assess 10 points against the defendant if, at the time of the sentencing offense, the offender is "on parole, probation, or delayed sentence status . . . ." MCL 777.56(1)(c). Zero points are to be assessed if the offender has no relationship to the criminal justice system. MCL 777.56(1)(e).

Defendant acknowledges that he was on probation at the time of the sentencing offense. He asserts, however, that he was on probation for a juvenile offense and that, because juvenile matters are not criminal in nature, he did not have a relationship to the criminal justice system. Defendant notes that proceedings involving juvenile offenders "[e]xcept as otherwise provided[2] . . . are not criminal proceedings," MCL 712A.1(2), and

[2] A proceeding involving a juvenile is a criminal proceeding if the juvenile is tried as an adult, see MCL 712A.2d, or if jurisdiction over the juvenile is waived to a court of general criminal jurisdiction, see MCL 712A.4.

that juvenile delinquency proceedings are not adversarial or criminal in nature, *In re Wilson*, 113 Mich App 113, 121; 317 NW2d 309 (1982). However, "[a] juvenile adjudication clearly constitutes criminal activity because 'it amounts to a violation of a criminal statute, even though that violation is not resolved in a "criminal proceeding." ' " *People v Harverson*, 291 Mich App 171, 180; 804 NW2d 757 (2010), quoting *People v Luckett*, 485 Mich 1076, 1076-1077 (2010) (YOUNG, J., concurring). As this Court has noted, juvenile proceedings "are closely analogous to the adversary criminal process." *In re Carey*, 241 Mich App 222, 227; 615 NW2d 742 (2000).

The phrase "criminal justice system" is not limited to adversarial criminal proceedings. Courts presume that the Legislature intended the plain meaning of the words it expressed. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). Black's Law Dictionary (9th ed) defines "criminal-justice system" as

> [t]he collective institutions through which an accused offender passes until the accusations have been disposed of or the assessed punishment concluded. The system typically has three components: law enforcement (police, sheriffs, marshals), the judicial process (judges, prosecutors, defense lawyers) *and corrections (prison officials, probation officers, and parole officers)*. [Emphasis added.]

A juvenile can be placed on probation. MCL 712A.18(1)(b). A juvenile can also be incarcerated for violating probation. MCL 771.7; MCL 712A.18i(9); MCL 712A.18i(10)(f). Juveniles on probation are involved with the corrections aspect of the criminal justice system. This Court has refused to "categorize a defendant as having no relationship with the criminal justice system when it is obvious that such a relationship exists." *Johnson*, 293 Mich App at 88. Accordingly,

defendant's prior juvenile adjudications supported the trial court's scoring of this variable.

II. DEPARTURE FROM THE SENTENCING GUIDELINES

Alternatively, defendant argues that the trial court failed to articulate substantial and compelling reasons to exceed the recommended guidelines range for his minimum sentence.

Under the legislative sentencing guidelines, defendant's recommended minimum sentence range as a second-offense habitual offender was 57 to 95 months. However, it is well established that "[a] court may depart from the appropriate sentence range . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). In order to be substantial and compelling, the reasons on which the trial court relied "must be objective and verifiable." *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). "To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed." *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008). The reasons for departure must also "be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *Smith*, 482 Mich at 299. However, "[t]he trial court may not base a departure 'on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record . . . that the characteristic has been given inadequate or disproportionate weight.' " *Id*. at 300, quoting MCL 769.34(3)(b). Moreover, "the statutory guidelines require more than an articulation of reasons for *a* departure; they require justification for the

particular departure made." *Smith*, 482 Mich at 303. Thus, "the trial court . . . must justify *on the record* both the departure and the extent of the departure." *Id*. at 313.

If the trial court departs from the sentencing guidelines, this Court reviews for clear error whether a particular factor articulated by the trial court exists. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). A trial court's determination that a factor is objective and verifiable presents a question of law that this Court reviews de novo. *People v Uphaus (On Remand)*, 278 Mich App 174, 178; 748 NW2d 899 (2008). This Court reviews for an abuse of discretion the trial court's conclusion that the factors provide substantial and compelling reasons to depart from the guidelines. *Babcock*, 469 Mich at 264-265. The trial court abuses its discretion when its result lies outside the range of principled outcomes. *Id*. at 269; *Smith*, 482 Mich at 300.

In this case, the trial court articulated six primary reasons for its upward departure. The trial court found that defendant "deliberated this crime" and gave it "a great deal of thought" and that "the premeditated nature of that alone is not adequately considered by the guidelines." The court found that defendant meant to terrorize his parents and that this fact was not adequately considered by the guidelines. The court further stated that defendant had numerous opportunities to do something about his parents' safety, but that seemed to have been "a second thought in [his] mind." The court also found that offense variable (OV) 3, MCL 777.33 (physical injury to victim), did not adequately account for the severity of the prolonged nature of the pain from the burns the victims suffered. The court further found that the victims' psychological injuries exceeded the scope of OV 4, MCL 777.34 (psychological injury to victim), because the victims were defendant's parents. Finally, the court noted

reports from counselors regarding defendant's " 'pervasive pattern of disregard for and violation of the rights of others and failure to conform to social norms' " along with his escalating aggression against his parents and concluded that his parents and the public deserved to be protected from him. The trial court based its reasons for departure on the facts elicited at trial as well as the facts contained in the presentence investigation report (PSIR). A trial court's reason for departure is objective and verifiable when it relies on the PSIR or testimony on the record. See *People v Gonzalez*, 256 Mich App 212, 228-229; 663 NW2d 499 (2003). Defendant argues, however, that the legislative sentencing guidelines already took into account the trial court's reasons for departure.

A. PLANNING AND DELIBERATION

The trial court's first basis for departure was its finding that the guidelines did not account for the fact that defendant planned and deliberated the crime. Defendant argues that planning is part of committing arson and therefore cannot be a substantial and compelling factor. We disagree. Defendant joked with his friends earlier in the day about "taking his grandfather out." Defendant attempted to get a friend to assist him in burning down the house. Defendant walked to the garage, obtained gasoline, and placed it in and around the house. An accelerant was also found underneath the bedroom windows. Defendant admitted his actions and explained that he was angry with his parents.

The prosecution and defendant both attempt to characterize defendant's attempt to get help after starting the fire as a separate reason behind the trial court's deviation from the guidelines, but the trial court considered defendant's attempt to enlist assistance in the midst of discussing how defendant planned and thought

about the crime. Defendant's attempt to enlist assistance is a logical fact supporting the trial court's conclusion that defendant planned and thought about the crime. The trial court properly considered defendant's attempt to enlist aid in the context of considering defendant's planning and deliberation. Accordingly, the trial court did not abuse its discretion when it found that defendant's planning and deliberation constituted a substantial and compelling reason to depart from the guidelines. Defendant's actions in planning and deliberating the arson were objective and verifiable.

B. TERRORIZING THE VICTIMS

The trial court's second basis for departure was its finding that the sentencing guidelines did not adequately account for defendant's intent to terrorize the victims. OV 7 addresses aggravated physical abuse. MCL 777.37(1). OV 7 should be scored when a person was placed in danger of injury or loss of life. MCL 777.37(2). A score of 50 points is warranted when "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). However, the trial court did not assess points under OV 7. OV 7 could have been scored to account for the victims' fear and anxiety that resulted as a result of waking up to find their home on fire and their escape route blocked by fire, and the trial court did not satisfactorily explain why a score for that variable would have been inadequate to account for defendant's conduct in this regard.

C. FAILURE TO ASSIST

The trial court's third basis for departure was that defendant did nothing to assist the victims when the fire broke out. Whether defendant could have done

more to assist the victims is not objective and verifiable. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The trial court stated that defendant "did have an opportunity to do something about [his] parents' safety" but instead left, went to his friend's house, and only attempted to call 911 after the house was "lighting up the night sky." The trial court further stated that "panic or not, the very first thought that should have gone through your mind is to get your parents out of that home. And that seems to be a second thought in your mind." What defendant was or should have been thinking and what other actions defendant could have taken to assist his parents are not occurrences external to the mind and are not capable of being confirmed. Therefore, the trial court should not have used this factor as a reason to depart upward from the sentencing guidelines.

D. INJURIES

The trial court's fourth basis for departure was that the severity of the victims' prolonged pain as a result of their injuries was not adequately taken into account by OV 3. The trial court may not base a departure on characteristics already considered by the guidelines unless it finds that the characteristics were given inadequate or disproportionate weight. MCL 769.34(3)(b); *Smith*, 482 Mich at 300. Repercussions from crimes that "are to be expected" do not usually constitute substantial and compelling reasons to depart from the sentencing guidelines. *Smith*, 482 Mich at 301-302. However, if the repercussions are a "wide deviation from the norm" they can be substantial and compelling reasons for departure. *Id*. at 302.

The trial recognized that OV 3 accounted for the victims' injuries, but determined that in this case the

guidelines afforded the injuries inadequate weight. MCL 777.33(1)(c) directs the trial court to assess 25 points for OV 3 if "[l]ife threatening or permanent incapacitating injury occurred to a victim." The trial court noted that OV 3 had been scored in this case, but concluded that "the scoring was not adequate considering that these were burns, that the pain is prolonged," and that the victims had not just suffered from the incapacitating nature of the injuries but "suffer[ed] the pain of the injuries that are exceedingly severe."

The fact that the victims suffered extreme burns over much of their bodies is objective and verifiable and keenly grabs this Court's attention. Defendant's mother detailed her pain and injuries in her victim impact statement. The victims' "massive" burns were established at trial. The victims testified about their injuries, some of which were still present at the time of trial. They testified that they were still on medication for the injuries and were still undergoing treatment. Further, it is common knowledge that severe burns produce serious, long-lasting pain. The existence of the victims' unusually severe burn injuries was objective and verifiable, and the trial court did not abuse its discretion when it determined that the severity of those injuries was a substantial and compelling reason in support of its sentencing departure.

E. PSYCHOLOGICAL HARM

The fifth basis for the trial court's departure was that OV 4 did not adequately account for the victims' psychological harm. OV 4 considers "psychological injury to a victim." MCL 777.34(1). The instructions provide that 10 points are to be assessed "if the serious psychological injury may require professional treatment." MCL 777.34(2). The trial court assessed 10 points for OV 4.

However, the trial court concluded that the victims' suffering was not adequately addressed by the guidelines. Beyond the trauma associated with the fire, defendant's mother stated that she has had to endure her family members' "horror of realizing that the pain was the result of the actions of family member [sic] that they loved and cared for." She continued to feel "frightened, vulnerable, heart-broken, angry, confused, embarrassed, and sad most of the time." She was not sure if her family would ever be the same and was "not even comfortable being with my other family members other than my husband." At sentencing, she testified that she felt as if she had failed defendant. Although OV 4 accounts for psychological injuries suffered by victims, it does not adequately consider the ways in which an offense affects familial relationships, see *People v Armstrong*, 247 Mich App 423, 425-426; 636 NW2d 785 (2001), nor does it always account for the unique psychological injuries suffered by individual victims, see *Smith*, 482 Mich at 302. Under the circumstances of this case, the trial court did not err by finding that the guidelines did not adequately account for the psychological injuries suffered by the victims. Consequently, this was a substantial and compelling reason to depart upward from the guidelines.

F. PUBLIC SAFETY

The trial court's sixth basis for departing from the guidelines was that defendant had a propensity to reoffend and was therefore a threat to public safety. A court's opinion or speculation about a defendant's future dangerousness is not objective or verifiable. *People v Cline*, 276 Mich App 634, 651; 741 NW2d 563 (2007). But the trial court may base a sentencing departure on a defendant's future dangerousness if objective and verifiable facts support the court's conclusion, such as

the defendant's past failures to rehabilitate or demonstrated "obsessive or uncontrollable urges to commit certain offenses." *Horn*, 279 Mich App at 45. Recurring and escalating acts of violence are objective and verifiable because they are external occurrences that can be confirmed. *Id*. at 46.

In this case, the trial court based its conclusions on objective and verifiable facts. The court noted that defendant had been "diagnosed with symptoms of oppositional defiant disorder" and had not benefitted from the various forms of counseling he had received from a young age. Defendant had threatened, stolen from, and damaged the property of his parents on "numerous occasions." The trial court determined that defendant's "escalation of violence" toward his parents was not adequately addressed by the sentencing guidelines. The trial court did not simply state that it thought defendant had a propensity to reoffend—it supported its conclusion with objective, verifiable, external determinations.

The trial court did not abuse its discretion when it determined that those facts were a substantial and compelling reason to depart upward from the sentencing guidelines. The court noted that a counseling report recommended that defendant receive counseling while in prison. The court concluded that defendant's parents and the public needed protection from defendant for a significant period of time. The trial court did not abuse its discretion when it determined that defendant's history of violence toward his parents and his inability to benefit from previous counseling justified an upward departure from the guidelines.

G. UPWARD DEPARTURE

Defendant is not entitled to resentencing because, even though the trial court erred in some respects, the

court made it clear that it would have departed to the same degree even without those errors. When the trial court articulates several substantial and compelling reasons, if some of the reasons are valid and others are not, this Court must determine whether the trial court would have departed to the same degree on the basis of the valid reasons alone. See *Babcock*, 469 Mich at 273. If the trial court would have imposed the same sentence regardless of a misunderstanding of the law, this Court may affirm. *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005).

The trial court erred as a matter of law when it concluded that the guidelines did not account for the defendant's actions in terrorizing the victims. The trial court also did not rely on an objective and verifiable factor when it determined that defendant should have done more to assist his parents to escape from the fire. However, the trial court's upward departure was supported by other objective and verifiable factors that keenly grabbed the court's attention, including the planning defendant engaged in, the extreme nature of the victims' injuries, the victims' unusual level of psychological trauma, defendant's pattern of escalating violence toward the victims, and defendant's inability to benefit from counseling. The trial court stated that it thought that any one of the reasons it articulated justified an upward departure. Given the court's comments, we are satisfied that the court would have departed to the same degree on the basis of the valid reasons alone.

Affirmed.

FITZGERALD, P.J., and METER and BOONSTRA, JJ., concurred.

BRONSON METHODIST HOSPITAL v MICHIGAN ASSIGNED CLAIMS FACILITY

BRONSON METHODIST HOSPITAL v PROGRESSIVE MICHIGAN INSURANCE COMPANY

Docket Nos. 300035 and 300066. Submitted December 7, 2011, at Grand Rapids. Decided August 30, 2012. Approved for publication October 23, 2012, at 9:10 a.m. Leave to appeal denied, 493 Mich 939.

Bronson Methodist Hospital filed an action in the Kalamazoo Circuit Court against Progressive Michigan Insurance Company (Docket No. 300066) and a subsequent action in that court against the Michigan Assigned Claims Facility (MACF) (Docket No. 300035), seeking to recover no-fault benefits for the cost of medical treatment it provided to Danielle Pillars for injuries she had received in a car accident. Progressive issued a no-fault insurance policy to Nicholas E. Owsiany, insuring a vehicle owned by Pillars, his fiancée, and naming Pillars as an excluded driver. Plaintiff treated Pillars for the injuries she received in an accident while driving the insured vehicle. Progressive denied no-fault benefits for Pillars under the named-driver exclusion of the policy and MCL 500.3113(b). After plaintiff filed the action against Progressive, Progressive filed a third-party complaint against Owsiany, Pillars, the MACF, and Michigan Mutual Insurance Company. While the original action against Progressive was pending, plaintiff filed the action against the MACF. In Docket No. 300066, the court, Pamela L. Litghtvoet, J., granted summary disposition in favor of the MACF on the third-party complaint. The court also granted summary disposition in favor of Progressive, finding that it had properly excluded coverage for Pillars. In Docket No. 300035, the court granted summary disposition in favor of the MACF, finding that Pillars was not covered by the policy because she was named as an excluded driver under the terms of the policy. Plaintiff appealed, and the Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. Under MCL 500.3101(1) of the no-fault act, the owner or registrant of a motor vehicle that is required to be registered in Michigan must maintain security for the payment of personal protection insurance (PIP) benefits, property protection insurance benefits, and residual liability insurance benefits. But under MCL

500.3113(b), a person is not entitled to be paid PIP benefits for accidental bodily injury if at the time of the accident the person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by MCL 500.3101 or MCL 500.3103 was not in effect. MCL 500.3009(2) provides that an insured may exclude automobile liability or motor vehicle coverage when a vehicle is operated by a named person. The trial court properly granted summary disposition in favor of Progressive in Docket No. 300066. The insured vehicle was uninsured at the time of the accident under the plain language of MCL 500.3009(2) and the terms of the insurance policy because Pillars, the driver of the car, was a named, excluded driver in the policy. For this reason there was no personal liability or property damage security required by MCL 500.3101 in effect at the time of the accident and Pillars, under MCL 500.3113(b), was not entitled to PIP benefits because at the time of the accident she was the owner or registrant of the motor vehicle involved in the accident and the security required by MCL 500.3101 was not in effect because of the policy's named-driver exclusion.

2. Plaintiff failed to provide either argument or authority for its claim that the court should order the MACF to assign plaintiff's claim to another no-fault carrier if Pillars was determined to be ineligible for PIP benefits under Progressive's policy because of the named-driver exclusion and statutory provisions. Accordingly, the trial court properly granted summary disposition to the MACF because plaintiff abandoned the issue.

3. Plaintiff's argument regarding the language used in the named-driver exclusion was not properly before the Court of Appeals because the issue was raised for the first time on appeal and its inclusion in a reply brief exceeded the scope permitted by MCR 7.212(G).

Affirmed.

Miller Johnson (by *Richard E. Hillary, II*) for Bronson Methodist Hospital.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Joseph T. Froehlich*, Assistant Attorney General, for the Michigan Assigned Claims Facility.

Wheeler Upham, P.C. (by *Gary A. Maximiuk* and *Nicholas S. Ayoub*), for Progressive Michigan Insurance Company.

Before: MARKEY, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM. This case involves two consolidated no-fault insurance cases. In Docket No. 300035, plaintiff, Bronson Methodist Hospital, appeals as of right the order granting the motion of defendant, Michigan Assigned Claims Facility (MACF), for summary disposition pursuant to MCR 2.116(C)(10) and denying plaintiff's motion for summary disposition. In Docket No. 300066, plaintiff appeals as of right the order denying plaintiff's motion for summary disposition and granting summary disposition pursuant to MCR 2.116(I)(2) in favor of defendant, Progressive Michigan Insurance Company. We affirm.

The underlying facts are undisputed. Progressive issued a no-fault insurance policy to Nicholas Evan Owsiany, insuring a vehicle owned by Owsiany's fiancée, Danielle Pillars. The policy names Pillars as an excluded driver. Plaintiff treated Pillars for injuries she received in an accident while she was driving the insured vehicle. Plaintiff concedes that Progressive complied with MCL 500.3009(2) and "properly excluded Ms. Pillars from coverage for liability, uninsured/underinsured motorist coverage, and motor vehicle damage coverage."

Progressive denied no-fault benefits for Pillars under the policy's named-driver exclusion[1] and MCL 500.3113(b), which provides:

[1] Progressive's insurance policy contains a "Named Driver Exclusion Endorsement" that specifically excludes personal liability, property damage, and uninsured/underinsured motorist coverage for named drivers. The endorsement also provides: "Additionally, if the owner or registrant of a **covered auto** is injured in an accident where an **auto** is being driven by a

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident . . . :
>
> * * *
>
> (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by [MCL 500.3101] or [MCL 500.3103] was not in effect.

MCL 500.3101(1) provides, in part, "The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance."

Plaintiff billed Progressive, as the insurer of the vehicle involved in the accident, for the cost of treating Pillars. Progressive denied personal protection insurance (PIP)[2] coverage on the ground that the security required by MCL 500.3101 was not in effect at the time of the accident because Pillars was an excluded driver who also owned the vehicle involved in the accident.

Plaintiff initially brought its action for no-fault benefits against Progressive. Progressive filed a third-party complaint against Owsiany, Pillars, and the MACF. The trial court subsequently granted summary disposition in favor of MACF with regard to the third-party com-

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named excluded driver, no Personal Protection Insurance (PIP) is provided under Part II for that owner or registrant." The endorsement further provides that "[i]f a covered **auto** is operated by the excluded driver, the **auto** will be considered uninsured under the no-fault law." The declarations page of the policy states: "**WARNING -** When a named excluded person operates a vehicle, all liability coverage is void — no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally responsible." See MCL 500.3009(2).

[2] See *Roberts v Farmers Ins Exch*, 275 Mich App 58, 66-67 n 4; 737 NW2d 332 (2007).

plaint. While motions for summary disposition were still pending in the original action, plaintiff filed a new action for no-fault benefits against the MACF. Plaintiff asserted that the MACF was liable or, in the alternative, should be ordered to assign plaintiff's no-fault claim to another no-fault insurer if Progressive's named-driver exclusion were upheld. The trial court granted summary disposition in favor of both the MACF and Progressive, finding that Progressive had properly excluded coverage for Pillars.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Iqbal v Bristol West Ins Group*, 278 Mich App 31, 36; 748 NW2d 574 (2008). We also review de novo the construction of unambiguous contract language, as well as the interpretation and application of statutes. *Id.*; *Citizens Ins Co v Secura Ins*, 279 Mich App 69, 72; 755 NW2d 563 (2008). The trial court properly grants a motion for summary disposition under MCR 2.116(C)(10) when there are no disputed material facts and the moving party is entitled to judgment as a matter of law. *Ulrich v Farm Bureau Ins*, 288 Mich App 310, 316; 792 NW2d 408 (2010).

Plaintiff argues that MCL 500.3105(1) obligates Progressive, as the no-fault carrier for the accident vehicle, to provide no-fault benefits and that to the extent Progressive's policy conflicts with this statutory provision, "it is contrary to public policy and, therefore, invalid." *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 601; 648 NW2d 591 (2002). Additionally, plaintiff relies on *Iqbal* in support of its argument that the insurance obtained by Owsiany on the vehicle provided the security required by MCL 500.3101 and that the exclusion for PIP benefits in MCL 500.3113(b) therefore does not apply. We disagree.

In *Iqbal*, the plaintiff was injured while driving a car that the plaintiff's brother had insured through AAA. The plaintiff resided with his sister and was therefore covered "under the umbrella of a household no-fault insurance policy issued by Bristol." *Iqbal*, 278 Mich App at 32. Bristol argued that the plaintiff was an "owner" of the accident vehicle as defined in MCL 500.3101(2)(g)(*i*) because he had the use of the car for more than 30 days; consequently, the plaintiff was personally required to maintain insurance on the vehicle under the no-fault act even though the plaintiff's brother had already insured the vehicle. *Iqbal*, 278 Mich App at 32-33. Bristol contended that because the plaintiff had failed to personally insure the vehicle as required by MCL 500.3101(1), the plaintiff was not entitled to collect PIP benefits pursuant to MCL 500.3113(b). The *Iqbal* Court disagreed. "Because the language in MCL 500.3113(b) precluding recovery of PIP benefits links the security or insurance requirement to the vehicle only and not the person, the trial court correctly ruled that plaintiff was entitled to PIP benefits because the vehicle was in fact insured, regardless of whether plaintiff was the 'owner' of the vehicle." *Id.* at 33.

Plaintiff's reliance on *Iqbal* is unavailing because that case is both factually and legally distinct.[3] The *Iqbal* case did not involve a situation in which a named excluded driver was operating the accident vehicle. Rather, the question presented in *Iqbal* was whether a person who could also be considered an "owner" under MCL 500.3101(2)(g)(*i*)[4]—because of "having the use" of the vehicle "for a period that is greater than 30 days"—must also insure the vehicle. The *Iqbal* Court held that

[3] The only similarity between *Iqbal* and the present case is that someone other than the injured driver of the accident vehicle obtained the insurance on the vehicle.

[4] 2008 PA 241 redesignated this provision as MCL 500.3101(2)(h)(*i*).

the answer to this question was no. The Court held that the language of MCL 500.3113(b) "links the required security or insurance solely to the vehicle." *Iqbal*, 278 Mich App at 39. Further distinguishing *Iqbal* from the present case is the fact that in *Iqbal* there was no dispute that the insurance obtained by the plaintiff's brother provided the security required by MCL 500.3101 and that this security was "in effect" at the time of the accident as required by MCL 500.3113(b). *Id.* at 40.

In the present case, the policy that Owsiany obtained from Progressive excluded a named driver as permitted by MCL 500.3009(2), and this driver was also the injured, registered owner-driver. We must enforce as written both the plain and unambiguous language of the statute, *id.* at 36-37, and the clear and unambiguous terms of the insurance policy not in conflict with the statute, *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 418; 668 NW2d 199 (2003). Applying the plain language of both the insurance policy's named-driver exclusion and the statute, at the time of the accident "all liability coverage [was] void—no one [was] insured," see MCL 500.3009(2), because the excluded driver was operating the vehicle. Stated otherwise, Pillars's act of driving the insured vehicle at the time of the accident rendered the vehicle uninsured; there was no personal liability or property damage "security" required by MCL 500.3101 in effect at the time of the accident. Pursuant to MCL 500.3113(b), Pillars is not entitled to PIP benefits because "at the time of the accident" she was "the owner or registrant of [the] motor vehicle . . . involved in the accident" and "the security required [MCL 500.3101] . . . was not in effect." Consequently, the trial court correctly granted Progressive summary disposition in Docket No. 300066.

Plaintiff presents no argument or citation to authority in support of its contention that, if the named-driver exclusion and statutory provisions operate to render Pillars ineligible for PIP benefits under Progressive's policy, the Court should order the MACF to assign plaintiff's claim to another no-fault carrier. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Because plaintiff has not provided either argument or authority on this issue, we deem the issue abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Consequently, the trial court correctly granted summary disposition in favor of the MACF.

Finally, plaintiff's argument regarding the language used in the named-driver exclusion is raised for the first time on appeal in its reply brief. This argument is not properly before the Court. Reply briefs must be limited to "rebuttal of the arguments in the appellee's or cross-appellee's brief . . . ." MCR 7.212(G); see also *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 174; 744 NW2d 184 (2007). "[R]aising an issue for the first time in a reply brief is not sufficient to present the issue for appeal." *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003).

We affirm. As the prevailing parties, the defendant-appellee in each case may tax costs pursuant to MCR 7.219(A).

MARKEY, P.J., and FITZGERALD and BORRELLO, JJ., concurred.

MAPLE GROVE TOWNSHIP v MISTEGUAY CREEK INTERCOUNTY DRAIN BOARD

Docket No. 304965. Submitted September 6, 2012, at Detroit. Decided September 18, 2012. Approved for publication October 23, 2012, at 9:15 a.m.

Maple Grove Township and seven other townships brought an action in the Genesee Circuit Court against the Misteguay Creek Intercounty Drain Board, seeking an order of superintending control over the drain board. The dispute arose when Albee Township, located in Saginaw County, petitioned the drain board, seeking the "cleaning out, relocating, widening, deepening, straightening, tiling, extending or relocating along a highway, adding branches, and/or installing, maintaining or repairing structures or mechanical devices to the [Misteguay Creek Intercounty Drain]," located in the counties of Shiawassee, Genesee, and Saginaw. The drain board held a practicability hearing pursuant to § 192 of the Drain Code, MCL 280.192, on June 3, 2010, determined that the drain improvements were practicable, and entered an order of practicability. The drain board then scheduled a necessity hearing to determine whether the improvements were "necessary for the good of the public health, convenience, or welfare" pursuant to § 122 of the Drain Code, MCL 280.122. When the number of people seeking to attend the necessity hearing exceeded the capacity of the facility, the hearing was suspended and an announcement was made that the hearing would be rescheduled to occur at a larger facility. Before the necessity hearing was rescheduled, plaintiffs filed their action. Plaintiffs alleged that after the practicability hearing the drain board had sought to increase the size of the proposed drainage district and increase the estimated cost of the project from $2.5 million to $6.1 million, plus additional costs for contingencies. Plaintiffs alleged that a second practicability hearing had to be held with regard to the larger, more costly project. Plaintiffs also alleged that Albee Township's petition failed to satisfy the requirements of §§ 121 and 192 of the Drain Code, MCL 280.121 and 280.192, respectively, to properly petition for the drainage project and, therefore, the drain board lacked jurisdiction over the proposed project. The

drain board sought summary disposition pursuant to MCR 2.116(C)(5), (8), and (10), arguing that plaintiffs lacked standing to assert claims on behalf of individuals who were not parties to the action and that the petition was sufficient to allow the drain board to proceed because MCL 280.192 permits a sole township to petition for maintenance and improvements to an intercounty drain. The drain board argued that the practicability hearing had appropriately focused on whether the petition and proposed improvements were practicable and that the issue regarding whether to add lands to the drainage district was not to be addressed unless and until a determination of practicability had been made. The drain board thus asserted that only one practicability hearing was required and necessary. The court, Geoffrey L. Neithercut, J., agreed with the drain board and granted its motion for summary disposition. The townships of Maple Grove, Hazelton, Venice, New Haven, and Caledonia appealed.

The Court of Appeals *held*:

The trial court properly held that the petition filed by Albee Township was sufficient to confer jurisdiction on the drain board to conduct proceedings pursuant to the Drain Code, a second practicability hearing was not statutorily required, and a hearing regarding the proposed addition of land to the drainage district was not required to be held before a hearing to determine the necessity of the proposed drainage project.

1. Plaintiffs abandoned any claim of error with respect to the trial court's decision granting summary disposition under MCR 2.116(C)(5) because they failed to provide any substantive argument challenging the decision.

2. The petition filed by Albee Township sought the maintenance and improvement of an established drain. The trial court properly held that MCL 280.121, which explicitly applies to a petition to locate, establish, and construct a drain, was inapplicable.

3. Because a petition was filed, the provisions of MCL 280.196(4) and (5) that permit the drain board to proceed without a petition were properly held to be inapplicable by the trial court.

4. The trial court properly held that MCL 280.196(9) was inapplicable because Albee Township's petition sought more than the mere inspection, maintenance, and repair of the drain and did not indicate that the township would be responsible for the entire cost of the proposed drain project.

5. The petition filed by Albee Township was filed pursuant to MCL 280.192. The trial court properly held that, under the circumstances of this action, the statute allowed the petition to be signed solely by the township. The petition sought "cleaning out, relocating, widening, deepening, straightening, tiling, extending or relocating along a highway, adding branches, and/or installing, maintaining or repairing structures or mechanical devices to the drain" and asserted that the project was "necessary and conducive to the public health, convenience, or welfare" of Albee Township. The petition also asserted that the petition was authorized by the township's governing body and that the township "will be liable to assessments at large for at least a percentage of the total amount to be assessed for the cost of the proposed drain project." The petition used the same relevant language as the statute, which explicitly provides a method for initiating a drainage project solely by a city, village, or township when the project is necessary to the public health. The fact that other statutory provisions provide alternative methods for initiating a drainage project does not negate or render nugatory the applicable language of MCL 280.192. The language allowing a single city, village, or township to sign a petition does not render the language permitting a combination of municipalities to sign a petition mere surplusage.

6. The trial court properly held that there was no merit to plaintiffs' argument that a second practicability hearing must be held because the size and cost of the project increased after the practicability hearing. MCL 280.104 clearly provides that the scope of a proposed drainage project, including the area encompassed by the drainage district and the cost of the project, is not determined until a surveyor or engineer conducts a survey after the drain board determines at a practicability hearing that a proposed project is practicable.

7. The trial court properly held that there was no merit to plaintiff's argument that MCL 280.197(2) requires a hearing regarding the proposed addition of land to a drainage district to be held before a hearing to determine the necessity of the proposed project. MCL 280.72 and MCL 280.197 indicate that a necessity hearing precedes a hearing to determine whether to add land to a drainage district.

Affirmed.

1. DRAINS — DRAIN CODE — PETITIONS TO ESTABLISH DRAINS.

The provisions of § 121 of the Drain Code pertain to new drains rather than preexisting drains (MCL 280.121).

2. DRAINS — DRAIN CODE — MAINTENANCE AND REPAIR — PETITIONS AND RESOLUTIONS.

The provisions of subsections (4) and (5) of § 196 of the Drain Code regarding the maintenance and repair of a drain by a drainage board apply when a petition or resolution for such maintenance and repair has not been filed and are inapplicable when one has been filed (MCL 280.196[4] and [5]).

3. DRAINS — DRAIN CODE — PETITIONS TO INITIATE DRAINAGE PROJECTS.

Section 192 of the Drain Code explicitly provides a method for initiating a drainage project with a petition signed solely by a city, village, or township when the project is necessary for the public health of one or more cities, villages, or townships; the fact that other provisions of the Drain Code provide alternative methods for initiating a drainage project does not negate or render nugatory the language of § 192; the statute also provides a second method for initiating a drainage project that allows a petition for the project to be signed by any combination of such municipalities if the municipalities will be liable to assessments at large for a percentage of the total amount to be assessed for the cost of the proposed work; the statutory language allowing a single city, village, or township to sign a petition does not render the statutory language permitting a combination of municipalities to sign a petition mere surplusage (MCL 280.192).

4. DRAINS — DRAINAGE BOARDS — PROPOSED PROJECTS — PRACTICABILITY HEARINGS — SURVEYS.

The purposes of a practicability hearing by a drainage board are to determine the sufficiency of the signatures on an application for a drainage project and to determine whether the proposed project is practicable; the scope of a proposed drainage project, including the area encompassed in the drainage district and the cost of the project, is not determined until a surveyor or engineer conducts a survey after the drainage board determines at a practicability hearing that the proposed project is practicable; a second practicability hearing is not required when such a survey results in an increase in the scope of the proposed project (MCL 280.103; MCL 280.104; MCL 280.192).

5. DRAINS — DRAIN CODE — NECESSITY HEARINGS — HEARING REGARDING ENLARGEMENT OF DRAINAGE DISTRICTS.

The Drain Code does not require a hearing to determine the proposed addition of land to a drainage district to be held before a hearing to determine the necessity of a proposed drainage project;

a necessity hearing precedes a hearing to determine whether to add land to a drainage district (MCL 280.72; MCL 280.197).

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C. (by *John H. Bauckham* and *John K. Lohrstorfer*), for Maple Grove Township, Hazelton Township, Venice Township, New Haven Township, and Caledonia Township.

The Hubbard Law Firm, P.C. (by *Michael G. Woodworth* and *Michelle M. Brya*), for the Misteguay Creek Intercounty Drain Board.

Before: CAVANAGH, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM. The plaintiffs townships of Maple Grove, Hazelton, Venice, New Haven, and Caledonia appeal as of right the trial court's order granting summary disposition for defendant, Misteguay Creek Intercounty Drain Board (the Drain Board), in this action involving the Drain Code, MCL 280.1 *et seq*. Because a petition filed by Albee Township was sufficient to confer jurisdiction on the Drain Board to conduct proceedings pursuant to the Drain Code, a second practicability hearing was not statutorily required, and a hearing regarding the proposed addition of land to the drainage district was not required to be held before a hearing to determine the necessity of the proposed drainage project, we affirm.

This case involves the Misteguay Creek Intercounty Drain, located in the counties of Shiawassee, Genesee, and Saginaw. On April 13, 2010, Saginaw County's Albee Township filed a petition seeking the "cleaning out, relocating, widening, deepening, straightening, tiling, extending or relocating along a highway, adding branches, and/or installing, maintaining or repairing structures or mechanical devices

to the drain . . . .” Following a June 3, 2010, practicability hearing pursuant to MCL 280.192, the Drain Board determined that the drain improvements were practicable and entered an order of practicability. Thereafter, the Drain Board scheduled a necessity hearing to determine whether the improvements were “necessary for the good of the public health, convenience, or welfare” pursuant to MCL 280.122. Because of the large number of attendees at the April 14, 2011, necessity hearing and applicable fire marshall regulations, the hearing was suspended and an announcement was made that the hearing would be rescheduled to occur at a facility capable of accommodating the large crowd.

On May 2, 2011, before the necessity hearing was rescheduled, plaintiffs[1] filed a complaint and petition for an order of superintending control over the Drain Board. In their complaint and petition, and their first amendment thereto, plaintiffs asserted that after the practicability hearing, the Drain Board sought to increase the size of the proposed drainage district and increase the estimated cost of the project from $2.5 million to $6.1 million plus additional costs for contingencies. Plaintiffs alleged that a second practicability hearing must be held regarding the larger, more costly project. Plaintiffs also alleged that the failure of the petition to satisfy the requisites of MCL 280.121 and MCL 280.192 to properly petition for the drainage project divested the Drain Board of jurisdiction over the project.

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[1] Although plaintiffs Clayton Charter Township, Montrose Township, and Flushing Township are not parties to this appeal, they participated in the lower court proceedings. For the sake of simplicity, our use of the term “plaintiffs” does not differentiate between the parties that participated below and those participating in this appeal.

In response, the Drain Board filed a motion for summary disposition pursuant to MCR 2.116(C)(5), (8), and (10). With respect to subrule (C)(5), the Drain Board argued that plaintiffs lacked standing to assert claims on behalf of individuals who were not parties to the action. Regarding subrules (C)(8) and (10), the Drain Board argued that the practicability hearing appropriately focused on whether the petition and proposed improvements were practicable and that the issue whether to add lands to a drainage district was not to be addressed unless and until a determination of practicability was made. Thus, the Drain Board contended that only one practicability hearing was required and necessary. The Drain Board also asserted that Albee Township's petition was sufficient to allow the Drain Board to proceed because MCL 280.192 permits a sole township to petition for maintenance and improvements to an intercounty drain. The trial court agreed and granted the Drain Board's motion.

We review de novo a trial court's decision on a motion for summary disposition. *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010). A motion under "MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under subrule (C)(8) is appropriate "if no factual development could justify the plaintiff's claim for relief." *Id*. A motion for summary disposition under MCR 2.116(C)(10) "tests the factual support of a plaintiffs' claim." *Id*. In reviewing a motion under subrule (C)(10), we consider "the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine

issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).[2]

Plaintiffs first argue that Albee Township's petition was insufficient to confer jurisdiction on the Drain Board because it failed to comply with the requirements of several Drain Code statutes. We review de novo as a question of law an issue involving statutory interpretation. *Johnson v QFD, Inc*, 292 Mich App 359, 364; 807 NW2d 719 (2011). "When interpreting a statute, this Court's goal is to ascertain and give effect to the intent of the Legislature by enforcing plain language as it is written." *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 276; 730 NW2d 523 (2006). When statutory language is clear and unambiguous, courts must apply the plain language to the circumstances of the case, and judicial construction is unnecessary. *Dep't of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008). Courts should avoid an interpretation that would render any part of a statute surplusage or nugatory and must give effect to every word and phrase in a statute. *Dep't of Environmental Quality v Worth Twp*, 491 Mich 227, 238; 814 NW2d 646 (2012).

Plaintiffs contend that Albee Township's petition failed to comply with MCL 280.121, which provides, in relevant part:

> After an intercounty drainage district has been established and the order therefor filed as hereinbefore provided, a petition to locate, establish and construct a drain may be filed with any commissioner having jurisdiction of any of the lands designated in such order as constituting

[2] Because plaintiffs failed to provide any substantive argument challenging the trial court's decision granting summary disposition under MCR 2.116(C)(5), they have abandoned any claim of error with respect to that subrule. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

> the drainage district. Such petition shall ask for the location, establishment and construction of the drain or drains, or any part thereof, as described in said order. The petition shall be signed by a number of freeholders in said drainage district, whose lands would be liable to an assessment for benefits, equal to 1/2 of the number of freeholders whose lands would be traversed by the drain or drains applied for, or abut on the part of any highway or street along the side of which such drain extends, between the point where such drain enters such highway and the point where it leaves such highway and which lands are within the drainage district. Such petition shall be accompanied by a description of the land in said district owned by each signer and by a certificate of the county treasurer as to payment of taxes and special assessments against such lands . . . .

Plaintiffs argue that Albee Township's petition failed to comply with MCL 280.121 because it was not signed by any freeholders in the drainage district as required under the statute. The Drain Board correctly argues, however, that MCL 280.121 is inapplicable because it pertains to *new* drains rather than to preexisting drains. The statute explicitly applies to "a petition to locate, establish and construct a drain . . . ." The petition filed in this case was not a petition to locate, establish, or construct a drain. Rather, it was a petition seeking the maintenance and improvement of an established drain. Thus, MCL 280.121 is inapplicable.

Plaintiffs also argue that the petition failed to comply with MCL 280.196(4) and (5), which provide:

> (4) If an inspection discloses the necessity of expending money for the maintenance and repair of a drain in order to keep it in working order, the drain commissioner for a county drain, or the drainage board for an intercounty drain, may without petition expend an amount not to exceed in any 1 year $5,000.00 per mile or fraction of a mile for maintenance and repair of a drain, exclusive of inspection and engineering fees and the cost of publication and

> mailing. The determination of the maximum expenditure allowed without a petition or resolution shall be based on the total number of miles of the drain and not on the actual number of miles or location of the maintenance or repair.
>
> (5) If the drain commissioner or the drainage board finds it necessary to expend funds in excess of the amount established in subsection (4) per mile or fraction of a mile in any 1 year for the maintenance and repair of a drain, the additional amounts shall not be expended until approved by resolution of the governing body of each township, city, and village affected by more than 20% of the cost.

Plaintiffs assert that both the initial estimated cost of $2.5 million and the increased estimated cost of $6.1 million exceed the $5,000-per-mile cap for proceeding without a petition under the above provisions. Because a petition was filed, however, the Drain Board was not proceeding without a petition, and MCL 280.196(4) and (5) are inapplicable.

Plaintiffs further argue that the Drain Board could proceed under MCL 280.196(9) if Albee Township pays the entire cost of the project. MCL 280.196(9) states:

> Nothing in this section prohibits the drain commissioner or the drainage board from spending funds in excess of the amount established in subsection (4) per mile or fraction of a mile in any 1 year for inspection, maintenance, and repair of a drain when requested by a public corporation, if the public corporation pays the entire cost of the inspection, maintenance, and repair.

Subsection (9) is inapplicable, however, because Albee Township's petition sought more than the mere "inspection, maintenance, and repair" of the drain. It also sought, if necessary, to relocate, widen, deepen, add branches, and install structures or mechanical devices to the drain. In addition, Albee Township was not seeking sole responsibility for the entire cost of the project. In its petition, Albee Township averred that it

would be liable "for at least a percentage of the total amount to be assessed for the cost of the proposed drain project." It did not indicate that it would be responsible for the entire cost of the project as required under MCL 280.196(9). Thus, that provision is inapplicable.

An examination of Albee Township's petition reveals that it was filed pursuant to MCL 280.192, which provides:

> Whenever a drain or portion thereof, which traverses lands in more than 1 county, and lands in more than 1 county shall be subject to assessments, needs *cleaning out, relocating, widening, deepening, straightening, tiling, extending or relocating along a highway, or requires structures or mechanical devices* that will properly purify or improve the flow of the drain or pumping equipment necessary to assist or relieve the flow of the drain, or needs supplementing by the construction of 1 or more relief drains which may consist of new drains or extensions, enlargements or connections to existing drains, or needs 1 or more *branches added* thereto, freeholders within the drainage district equal to 50% of the number of freeholders whose lands are traversed by said drain or drains in said petition or abut on any highway or street along either side of which such drain extends, between the point where said drain enters such highway and the point where it leaves such highway or street and which lands are within the drainage district, may make a petition in writing to the commissioner of any county having lands in such district setting forth the necessity of such proposed work. *Whenever it is necessary for the public health of 1 or more cities, villages or townships, the petition may be signed solely by a city, village or township when duly authorized by its governing body or by any combination of such municipalities if the municipality or municipalities will be liable to assessments at large for a percentage of the total amount to be assessed for the cost of the proposed work*. The percentage of cost apportioned to the municipality or municipalities shall be based upon the benefits to accrue to such municipality or munici-

> palities and also the extent to which they contribute to the conditions which makes the drain necessary. Upon receipt of such petition, the commissioner shall notify the state director of agriculture and the commissioners of each county embracing any lands in the drainage district, and the director of agriculture shall call a meeting within the time and in the manner prescribed in [MCL 280.122]. The persons so named shall constitute a drainage board and if such work is then determined to be practicable, they may thereupon appoint a competent surveyor or engineer to make a survey of said drain, and lay out a drainage district according to [MCL 280.104]. After the surveyor or engineer has filed all data with the drainage board, the director of agriculture shall call a meeting as provided in [MCL 280.122], and thereafter take all steps and perform all acts which are required to be done by said board upon a petition for the location, establishment and construction of drains as provided in [MCL 280.121 to 280.135]. Such board and the commissioners shall exercise such power and be subject to such limitations as are provided in [MCL 280.121 to 280.135]. [Emphasis added.]

In its petition, Albee Township used the same language as used in the above provision. It sought "cleaning out, relocating, widening, deepening, straightening, tiling, extending or relocating along a highway, adding branches, and/or installing, maintaining or repairing structures or mechanical devices to the drain . . . ." In addition, the petition asserted that the project was "necessary and conducive to the public health, convenience, or welfare of Albee Township," that the petition was authorized by Albee Township's governing body, and that Albee Township "will be liable to assessments at large for at least a percentage of the total amount to be assessed for the cost of the proposed drain project." In such circumstances, MCL 280.192 allows a petition to be signed *solely* by a city, village, or township, as the trial court determined.

Plaintiffs argue that permitting a single township to petition for a drainage project that other townships, counties, villages, and cities will be partially responsible for the cost of is inconsistent with the other, previously quoted, sections of the Drain Code, which must be read together with MCL 280.192. "Statutes that relate to the same subject or share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another." *Mich Electric Coop Ass'n v Pub Serv Comm*, 267 Mich App 608, 616; 705 NW2d 709 (2005). Even reading the statutes together, however, MCL 280.192 explicitly provides a method for initiating a drainage project solely by a city, village, or township when the project is necessary for the public health. The fact that other statutory provisions provide alternative methods for initiating a drainage project does not negate or render nugatory the applicable language in MCL 280.192.

Plaintiffs also argue that allowing a single township to initiate a drain project would render mere surplusage the statutory phrase, quoted above, "or by any combination of such municipalities if the municipality or municipalities will be liable to assessments at large for a percentage of the total amount to be assessed for the cost of the proposed work." Plaintiffs contend that if a petition may be signed by only one township, then there is no need for a combination of municipalities to sign a petition. To the contrary, the statute provides two methods for initiating a drainage project when "it is necessary for the public health of 1 or more cities, villages or townships . . . ." The first method allows a petition to be signed "solely by a city, village or township when duly authorized by its governing body . . . ." The second method, as indicated by the disjunctive word "or," allows a petition to be signed "by any combination of such municipalities if the municipality

or municipalities will be liable to assessments at large for a percentage of the total amount to be assessed for the cost of the proposed work." Merely because a petition may be signed by only one city, village, or township does not foreclose the possibility that a combination of municipalities may wish to sign a petition in lieu of a single municipality. Thus, allowing a single city, village, or township to sign a petition does not render the statutory language permitting a combination of municipalities to sign a petition mere surplusage.

Finally, plaintiffs argue that a more logical interpretation of the word "solely" would result if that word was interpreted to mean that in lieu of a petition by 50 percent of the number of freeholders, a petition may be signed solely by the municipalities that will be liable to assessments at large. This interpretation, however, disregards the placement of the word "solely," which does not refer to or in any way pertain to the number of freeholders. Rather, the term immediately precedes the phrase "by a city, village or township . . . ." Thus, when read in context, the language states that "the petition may be signed solely by a city, village or township . . . ." "[S]tatutory language must be read and understood in its grammatical context." *Dep't of Environmental Quality*, 491 Mich at 238. Accordingly, plaintiffs' argument lacks merit. Because Albee Township's petition gave the Drain Board jurisdiction to proceed with the proposed drain project pursuant to MCL 280.192, the trial court did not err by granting the Drain Board's motion for summary disposition on that basis.

Plaintiffs next argue that the Drain Board failed to comply with the statutory requirement for practicability hearings when the practicability hearing that was held on June 3, 2010, pertained to a much smaller drainage project. Plaintiffs argue that a second practi-

cability hearing must be held because the size of the proposed drainage district increased after the practicability hearing and the estimated cost of the project increased from $2.5 million to $6.1 million plus additional costs for contingencies. Plaintiffs' argument lacks merit. MCL 280.103, which pertains to practicability hearings, provides:

> Upon convening said meeting the state director of agriculture or any deputy selected by him shall act as chairman. The said drainage board *shall consider such application, and determine the sufficiency of the signatures thereto, and shall go over the route of said proposed drain and take testimony to determine its practicability*. All persons owning lands liable to assessment for benefits or whose lands shall be crossed by said drain or any municipality affected may appear for or against said drain proceedings. If at said meeting or at any subsequent time before the entry of the order designating a drainage district, they shall determine that the drainage of the proposed drain area is not practical, no further action shall be taken thereon within 1 year. *If said proposed drain is determined to be practical, then the drainage board shall cause a survey thereof to be made by a competent surveyor or engineer to ascertain the area which would be drained by the proposed drain, and the route and type of construction of drain or drains most serviceable for that purpose*. [Emphasis added.]

Thus, the purposes of a practicability hearing are to determine the sufficiency of the signatures on an application and to determine whether a proposed drainage project is practicable. Only if the Drain Board determines that a proposed project is practicable will a survey be conducted to ascertain the area to be drained and the scope of the project.

MCL 280.103 is consistent with MCL 280.192, which states that if the Drain Board determines that the proposed project is practicable, it "may thereupon ap-

point a competent surveyor or engineer to make a survey of said drain, and lay out a drainage district according to [MCL 280.104]." MCL 280.104 provides:

> The surveyor or engineer authorized to make the survey shall ascertain the size and depth of the drains, and shall preserve all minutes with reference thereto. He shall prepare plans, drawings and profiles thereof, together with a computation of the yards of earth to be excavated, and where practicable the leveling of the spoil banks or the amount of tile or pipe to be used and the necessary bridges and culverts or fords to be built in constructing the proposed drains, *and his estimate of the cost of such construction. He shall thereupon lay out a proposed drainage district*, which district may be described by its boundaries of streets and highways or tracts or parcels of land or by a description of all tracts or parcels of land, including therein all highways, townships, counties, cities and villages which would be benefited by the construction of the proposed drain, all of which he shall deliver to the drainage board. *The surveyor or engineer shall not be limited to the route described in the application, but may recommend a route and type of construction for the drains he considers most serviceable for draining the area involved*. [Emphasis added.]

The emphasized language makes clear that the scope of a proposed drainage project, including the area encompassed in the drainage district and the cost of the project, is not determined until a surveyor or engineer conducts a survey *after the Drain Board determines at a practicability hearing that a proposed project is practicable*. Accordingly, plaintiffs' argument that a second practicability hearing must be conducted because the size and cost of the proposed project increased after the June 3, 2010, practicability hearing lacks merit.

Plaintiffs also argue that a hearing regarding the proposed addition of land to a drainage district must be held before a hearing to determine the necessity of the

proposed project. Plaintiffs contend that a hearing regarding the addition of land to a drainage district is separate and distinct from a necessity hearing and must precede the necessity hearing. Plaintiffs rely on MCL 280.197, which provides:

> (1) On receipt of a petition filed under this chapter, the commissioner or the drainage board may require a competent surveyor or engineer to make a survey of the drain or of the district, or a portion of the drain or district, or if necessary, lay out a new district including the land benefited, or make profiles, plans, or estimates of the work and file all data concerning the profiles, plans, or estimates with the commissioner or the chairperson of the drainage board. *If it appears that land has been added to the drainage district, the drain commissioner for a county drain, or the chairperson of the drainage board for an intercounty drain, shall notify the board of determination who allowed the petition that the land should be added to the district*. The drain commissioner or chairperson of the drainage board shall call a meeting of the board of determination. . . . The notice shall specify the time, date, and place within the drainage district at which the board of determination shall reconvene. The drain commissioner or chairperson of the drainage board also shall cause the notice to be published once in a newspaper of general circulation in the county or a newspaper of general circulation in the area where the drain improvement is contemplated at least 10 days before the meeting. Notice of the time and place of the meeting, by first class mail, shall be sent at least 10 days before the date of the meeting, to each person whose name appears upon the last city or township tax assessment roll as owning land within the enlarged drainage district, at the address shown on the roll. . . .
>
> (2) At the time, date, and place designated by the drain commissioner or the chairperson of the drainage board the board of determination shall reconvene. Upon reconvening, if the board of determination by a majority vote of members finds the proposed addition of the land to the drainage district necessary and conducive to the public health,

> convenience, or welfare, they shall make an order to that effect and file the order with the drain commissioner or drainage board. The drain commissioner or drainage board shall take the steps and perform the acts which are required for the locating, establishing, and constructing of drains as designated in chapter 4 or *chapter 6*. [Emphasis added.]

Plaintiffs note that chapter 6, referred to in subsection (2), pertains to intercounty drains and includes MCL 280.122,[3] which involves the calling of a necessity hearing regarding a proposed drainage project. Plaintiffs assert that, under the plain language of subsection (2), a necessity hearing is permitted only after an order is entered adding land to the drainage district. Again, plaintiffs' argument lacks merit.

MCL 280.197 refers to a "board of determination" and requires that the board of determination decide a petition to add land to a drainage district. A board of determination is a group of individuals appointed to "determine the necessity of the proposed drain and whether the drain is conducive to public health, convenience, or welfare." MCL 280.72(3). As stated in *Grubb Creek Action Comm v Shiawassee Co Drain Comm'r*, 218 Mich App 665, 669-670; 554 NW2d 612 (1996):

> The function of the board of determination is to determine whether a problem exists and whether a certain project is necessary. The board does not determine what is the best solution to the problem. If the board finds that the project is necessary, then the drain commissioner is responsible for assessing possible solutions. [Citations omitted.]

Under MCL 280.197(2), on which plaintiffs rely, the board of determination "shall *reconvene*" to determine whether "the proposed addition of the land to the

[3] Chapter 6, pertaining to intercounty drains, encompasses MCL 280.121 *et seq*.

drainage district [is] necessary and conducive to the public health, convenience, or welfare . . . ." [Emphasis added.] If so, the board of determination "shall make an order to that effect and file the order with the drain commissioner or drainage board" which "shall take the steps and perform the acts which are required for the locating, establishing, and constructing of drains as designated in chapter 4 or chapter 6." MCL 280.197(2). Thus, nothing in MCL 280.197 requires that a hearing to determine the proposed addition of land to a drainage district must be held before a hearing to determine the necessity of the proposed drainage project. In fact, it appears from MCL 280.72 and MCL 280.197 that the opposite is true, and that a necessity hearing precedes a hearing to determine whether to add land to a drainage district.[4] Therefore, summary disposition for the Drain Board was proper on this basis.

Finally, plaintiffs argue that the Drain Board's failure to comply with the requirements of the Drain Code, as discussed in their brief on appeal, precludes the assessment of costs against them or the drainage district pursuant to MCL 280.161. That provision states, in relevant part:

> [T]he circuit court of the county shall hear and determine the same without unnecessary delay, and if any material defect be found in the proceedings for establishing the drain, such proceedings shall be set aside. . . . If the proceedings be sustained, the party bringing the [action]

[4] We note that the term "board of determination" is a term of art as used in the Drain Code and that "[t]he drainage board shall be the board of determination and shall determine the question of necessity for drains located, established, and constructed under [chapter 6.]" MCL 280.122. Thus, an intercounty drainage board sits as a drainage board at a practicability hearing and as a board of determination at a necessity hearing.

> shall be liable for the costs thereof, and if they be not sustained, the parties making application for the drain shall be liable for the costs.

Because we have determined that plaintiffs' arguments lack merit and that the Drain Board did not fail to comply with Drain Code requirements, plaintiffs' argument regarding the assessment of costs necessarily fails as well.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

CAVANAGH, P.J., and SAAD and DONOFRIO, JJ., concurred.

CAPITAL AREA DISTRICT LIBRARY v MICHIGAN OPEN CARRY, INC

Docket No. 304582. Submitted July 11, 2012, at Lansing. Decided October 25, 2012, at 9:00 a.m. Leave to appeal sought.

The Capital Area District Library (CADL) brought an action against Michigan Open Carry, Inc. (MOC), in the Ingham Circuit Court for declaratory and injunctive relief, seeking to validate and enforce its policy that prohibited bringing weapons onto its premises. The court, Rosemarie E. Aquilina, J., granted summary disposition in CADL's favor, ruling that CADL, as a district library established under the District Library Establishment Act (DLEA), MCL 397.171 *et seq*., had the authority to promulgate its weapons policy under MCL 397.182(1) and, because CADL was not a local unit of government as defined by MCL 123.1101(a), MCL 123.1102 did not prohibit it from regulating firearms. The court also enjoined MOC and other members of the public from openly carrying weapons on library premises. MOC appealed.

The Court of Appeals *held*:

1. CADL had the authority to adopt its weapons policy under MCL 397.182(1), which allows a district library board to adopt bylaws and regulations governing the board and district library, supervise and control district library property, and do any other thing necessary for conducting the district library service.

2. CADL's policy regarding firearms on its premises was preempted by state law because the Legislature intended to occupy the field of firearms regulation. MCL 123.1102 provides that a local unit of government may not enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner, the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols or other firearms, ammunition for pistols or other firearms, or components of pistols or other firearms except as otherwise provided by state or federal law. MCL 123.1101(a) defines a local unit of government as including a city, village, township, or county. CADL is a district library that was jointly established by a both a city and a county pursuant to the DLEA, MCL 397.173. When two or more municipalities unite to establish a district library, they create an authority that is separate from the constituent municipalities. While MCL 123.1102 does not expressly bar district libraries created in this

manner from imposing firearms regulations, district libraries are quasi-municipal corporations, which are governmental agencies that can exercise only those powers that are granted in express words or necessarily and fairly implied in or incident to powers expressly conferred by the Legislature. State law may preempt a regulation by any inferior level of government that attempts to regulate the same subject matter as a higher level of government. A state statutory scheme preempts regulation by a lower-level governmental entity when (1) the local regulation directly conflicts with the state statutory scheme or (2) the state statutory scheme occupies the field of regulation that the lower level government entity seeks to enter, even if there is no direct conflict between the two schemes of regulation. CADL's weapons ban does not directly conflict with Michigan's statutory scheme pertaining to gun regulation because no Michigan statute expressly prohibits district libraries from regulating weapons. Whether the state has occupied a field of regulation is determined using the guidelines set forth in *People v Llewellyn*, 401 Mich 314 (1977). Under these guidelines, a state law preempts local regulation if it expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, and preemption may be implied if an examination of legislative history supports it, the state regulatory scheme is pervasive, or the nature of the regulated subject matter demands exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. In this case, first, although MCL 123.1102 does not explicitly state that it occupies the whole field of regulation, it expressly removes the power of local units of government to regulate in the field of firearms, subject to limited exceptions, which was a clear policy choice to remove from local units of government the authority to dictate where firearms may be taken. The language of MCL 123.1102 is broad and all-encompassing and cannot reasonably be interpreted to exclude local ordinances that address the carrying of firearms in municipal buildings. Second, the legislative history supported a finding that the purpose of the statute would only be served by leaving it to the state to regulate firearm possession in all buildings established by local units of government, including district libraries. MCL 123.1102 was designed to address the proliferation of local regulation regarding firearm ownership, sale and possession and the concern that continued local authority to enact and enforce gun control ordinances would result in the establishment of a patchwork of ordinances. The title of 1990 PA 319 states that the act was designed to prohibit local units of government from imposing restrictions in the area of firearms regulation. Although a district library is not included in the definition of "local unit of government" set forth in MCL 123.1101(a), excluding a district library from the field of regulation simply because it was established

by two local units of government instead of one would defy the purpose of the statute and lead to patchwork regulation. Third, the statutory scheme regulating firearms was pervasive, addressing who may possess a firearm; how, when, and where a firearm may be possessed; and how Michigan residents could obtain a license to carry a concealed weapon. The extent and specificity of this statutory scheme, coupled with the Legislature's clear policy choice to remove from local units of government the authority to dictate where firearms may be taken, demonstrated that the Legislature occupied the field of firearm regulation that CADL's weapons policy attempted to regulate. Fourth, the nature of the regulation of firearm possession demanded exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. Preventing all public libraries established by a city, village, township, or county from passing their own firearms regulations without preventing district libraries from doing so would result in a patchwork of inconsistent local regulations. Because state law preempted CADL's weapons policy, the trial court erred by granting summary disposition in favor of CADL and abused its discretion by permanently enjoining MOC, its members, their agents, and members of the public from entering CADL's buildings and branches while openly carrying a weapon in violation of CADL's weapons policy.

Reversed.

GLEICHER, P.J., concurring in part and dissenting in part, concurred with the majority's determinations that CADL was not a local unit of government as defined in MCL 123.1101(a) and that CADL's weapons policy was permitted by the DLEA but dissented from its conclusion CADL's policy was preempted by state law given that the plain language of MCL 123.1101(a) and MCL 123.1102 precluded only cities, villages, townships, and counties, not district libraries or authorities, from regulating firearm possession.

1. CONSTITUTIONAL LAW — PREEMPTION.

A state statutory scheme preempts regulation by a lower-level governmental entity when the local regulation directly conflicts with the state statutory scheme or the state statutory scheme occupies the field of regulation that the lower level government entity seeks to enter, even if there is no direct conflict between the two schemes of regulation; a state statutory scheme is preemptive if it expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive; preemption may be implied from a consideration of whether the legislative history of the state statutory scheme supports it, whether the scheme is

pervasive, and whether the nature of the regulated subject matter demands exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.

2. WEAPONS — FIREARMS — CONSTITUTIONAL LAW — PREEMPTION — LOCAL UNITS OF GOVERNMENT — DISTRICT LIBRARIES.

MCL 123.1102 provides that a local unit of government may not enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner, the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols or other firearms, ammunition for pistols or other firearms, or components of pistols or other firearms except as otherwise provided by state or federal law; state law completely occupies the field of firearm regulation to the exclusion of local units of government; a district library established under MCL 397.173, while not a local unit of government as defined by MCL 123.1101(a), is nevertheless preempted as a quasi-municipal agency from regulating the possession of firearms.

Murphy, Brenton & Spagnuolo, P.C. (by *Vincent P. Spagnuolo*, *Gary L. Bender*, and *Lindsay N. Dangl*), for plaintiff.

Dean G. Greenblatt, PLC (by *Dean G. Greenblatt*), for defendant.

Before: GLEICHER, P.J., and SAAD and BECKERING, JJ.

BECKERING, J. This case is about whether district libraries established under the District Library Establishment Act (DLEA), MCL 397.171 *et seq*., are subject to the same restrictions regarding firearm regulation that apply to public libraries established by local units of government. Plaintiff, the Capital Area District Library (CADL), brought this action for declaratory and injunctive relief, seeking to validate and enforce its ban on firearms on its premises. Defendant, Michigan Open Carry, Inc. (MOC), argues that CADL does not have the power to regulate firearms. Our job is not to determine who has the better moral argument regarding when and where it is appropri-

ate to carry guns. Instead, we are obligated to interpret and apply the law, regardless of whether we personally like the outcome. MCL 123.1102 expressly prohibits local units of government from regulating firearms except as otherwise provided by federal or state law. Our Court has held that, in light of MCL 123.1102, state law *completely occupies* the field of firearm regulation to the exclusion of local units of government. *Mich Coalition for Responsible Gun Owners v Ferndale*, 256 Mich App 401, 412-414; 662 NW2d 864 (2003). Although district libraries are not expressly included within the definition of a local unit of government for purposes of MCL 123.1102, because we are dealing with regulation by a quasi-municipal governmental agency in an area that is regulated by the state, we are bound to apply Michigan's doctrine of field preemption in determining whether a district library is free to regulate firearm possession. Our Supreme Court in *People v Llewellyn*, 401 Mich 314, 323-324; 257 NW2d 902 (1977), requires that we examine (1) legislative history pertaining to the regulated area, (2) the pervasiveness of the state regulatory scheme in the regulated area, and (3) the nature of the regulated subject matter and whether it demands exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. Because all three factors support a finding of field preemption, and because we are bound by this Court's field-preemption analysis in *Mich Coalition*, we reverse the trial court's rulings upholding and enforcing CADL's weapons policy to the extent it regulates firearm possession.

I. BASIC FACTS AND PROCEDURAL HISTORY

CADL is a district library established pursuant to the DLEA and a district-library agreement executed by the city of Lansing and Ingham County on March 10, 1997.

CADL has branches throughout Ingham County. It is funded by property taxes and state assistance; it also receives distributions of penal fines. Seven members constitute its operating board. Municipalities within the district appoint the board members; however, the board members operate independently of the municipalities. Under the DLEA, the operating board has the authority to adopt bylaws and regulations. CADL's operating board adopted a code of conduct that contains the following weapons policy, which is the subject of this litigation: "All weapons are banned from Library premises to the fullest extent permitted by law."

MOC is a Michigan nonprofit corporation. According to MOC, its objectives are to "protect our right to self-defense," "educate and desensitize the public and members of the law enforcement community about the legality of the open carry of a handgun in public," "exercise a natural right to self defense using . . . a handgun," and "demonstrate to the public at large that gun owners are one of the most lawful segments of society and that they have nothing to fear from the lawful carry of a firearm." One method MOC uses to accomplish these purposes is to hold "informal gatherings in public places throughout the state while [openly carrying] our handguns."

On multiple occasions between December 2010 and February 2011, individual members of MOC openly carried guns in CADL's downtown Lansing branch. One occasion allegedly involved a person carrying a shotgun. Some library patrons and employees were disturbed by the presence of exposed firearms. CADL believes that Michigan law permits it to prohibit the open carrying of firearms on its premises. Accordingly, when a person openly carries a handgun on CADL's premises, one of CADL's security guards asks the person to leave. Gen-

erally, the person complies with the security guard's request. If the person does not comply with the request, a security guard will stay near the person until he or she leaves the library. Initially, CADL's employees called the Lansing police when a person openly carrying a firearm entered the library. However, the Lansing police refused to remove the person without a court order.

CADL filed suit on February 15, 2011, seeking both a declaratory judgment establishing the validity of its weapons policy and injunctive relief to enforce the policy. The next day, the trial court granted CADL a temporary restraining order. On April 19, 2011, CADL moved the trial court for summary disposition under MCR 2.116(C)(9) (failure to state a valid defense) and (C)(10) (no genuine issue of material fact and entitlement to judgment as a matter of law). CADL argued that (1) its weapons policy is valid because it is within CADL's authority to adopt the policy and the policy is not preempted by MCL 123.1102 and (2) the open carrying of weapons is brandishing, which is prohibited by MCL 750.234e. MOC opposed the motion, arguing that CADL's policy is preempted by state law and violates the right to bear arms guaranteed by the United States and Michigan Constitutions. MOC also argued that MCL 750.234e does not prohibit the open carrying of a firearm because openly carrying a firearm is not brandishing.

The court granted summary disposition in favor of CADL under MCR 2.116(C)(9), holding that the DLEA authorized CADL to implement a weapons policy and that MCL 123.1102 does not preempt CADL's weapons policy. The court declined to determine whether open carrying constitutes illegal brandishing under MCL 750.234e. However, the court suggested that while mere open carrying may not necessarily constitute brandishing, doing so in a library has "an aspect of an intent to make someone

feel threatened or intimidated." The next day, the trial court issued a declaratory judgment upholding CADL's weapons policy as a matter of law. The court also permanently enjoined MOC, its members, their agents, and members of the public from entering CADL buildings or branches while openly carrying a weapon in violation of CADL's weapons policy.

II. STANDARD OF REVIEW

"Summary disposition under MCR 2.116(C)(9) is proper if a defendant fails to plead a valid defense to a claim." *Village of Dimondale v Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000). We review de novo a trial court's grant or denial of a motion for summary disposition under MCR 2.116(C)(9). See *Slater v Ann Arbor Pub Sch Bd of Ed*, 250 Mich App 419, 425; 648 NW2d 205 (2002). "When deciding a motion under MCR 2.116(C)(9), which tests the sufficiency of a defendant's pleadings, the trial court must accept as true all well-pleaded allegations and properly grants summary disposition where a defendant fails to plead a valid defense to a claim." *Id.* "Summary disposition under MCR 2.116(C)(9) is proper when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery." *Id.* at 425-426. Whether a state statutory scheme preempts a local regulation is a question of statutory interpretation and, thus, a question of law that we review de novo. *Ter Beek v City of Wyoming*, 297 Mich App 446, 452; 823 NW2d 864 (2012). Furthermore, we review for an abuse of discretion a trial court's decision to grant injunctive relief. *Taylor v Currie*, 277 Mich App 85, 93; 743 NW2d 571 (2007). A trial court abuses its discretion when it reaches a decision that falls outside the range of reasonable and principled outcomes. *Id.*

III. ANALYSIS

A. CADL'S AUTHORITY TO PROMULGATE RULES OR REGULATIONS PERTAINING TO FIREARM POSSESSION

MOC first argues that CADL had no authority under the DLEA to promulgate rules or regulations regarding the possession of firearms on its property. We disagree.

"The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011). The language is read according to its "ordinary and generally accepted meaning." *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 599; 575 NW2d 751 (1998). If the language of a statute is clear, it must be enforced as written "because the Legislature must have intended the meaning it plainly expressed." *Id.*

Under the Michigan Constitution, "[t]he legislature shall provide by law for the establishment and support of public libraries which shall be available to all residents of the state under regulations adopted by the governing bodies thereof." Const 1963, art 8, § 9. This constitutional provision grants public libraries, including district libraries, "the discretion to adopt regulations pertaining to the library's governance, functioning, and management of its resources." *Goldstone v Bloomfield Twp Pub Library*, 268 Mich App 642, 647; 708 NW2d 740 (2005); see also *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 575; 810 NW2d 110 (2011) (stating that a district library is a public library); MCL 397.552(d) (defining "public library").

Under the DLEA, two or more municipalities may enter into an agreement to create a district library. MCL 397.173; *Herrick Dist Library*, 293 Mich App at

575-576. A district library is governed by a board, which has the following statutory powers under MCL 397.182(1):

> (a) Establish, maintain, and operate a public library for the district.
>
> (b) Appoint and remove officers from among its members.
>
> (c) Appoint and remove a librarian and necessary assistants and fix their compensation.
>
> (d) Purchase, sell, convey, lease, or otherwise acquire or dispose of real or personal property, including, but not limited to, land contracts and installment purchase contracts.
>
> (e) Erect buildings.
>
> (f) *Supervise and control district library property*.
>
> (g) Enter into a contract to receive library-related service from or give library-related service to a library or a municipality within or without the district.
>
> (h) *Adopt bylaws and regulations, not inconsistent with this act, governing the board and the district library*.
>
> (i) Propose and levy upon approval of the electors as provided in this act a tax for support of the district library.
>
> (j) Borrow money pursuant to the district library financing act, 1988 PA 265, MCL 397.281 to 397.290.
>
> (k) Issue bonds pursuant to the district library financing act, 1988 PA 265, MCL 397.281 to 397.290.
>
> (*l*) Accept gifts and grants for the district library.
>
> (m) *Do any other thing necessary for conducting the district library service*, the cost of which shall be charged against the district library fund. [Emphasis added.]

We conclude that the library's weapons policy is permitted by the DLEA. Under MCL 397.182(1)(h), a district-library board may "[a]dopt bylaws and regulations . . . governing the board and the district library." Additionally, MCL 397.182(1)(m) allows a district-library board to "[d]o

any other thing necessary for conducting the district library service," and MCL 397.182(1)(f) allows a district-library board to "[s]upervise and control district library property." These are broad grants of power that logically cover the library's weapons policy. The library's weapons policy is a regulation that governs the district library and district-library services.

Accordingly, the trial court correctly held that CADL has the authority under the DLEA to adopt the weapons policy.

B. PREEMPTION

MOC also argues that CADL is expressly and impliedly preempted from promulgating regulations regarding firearms on its premises. For the reasons set forth below, we agree that field preemption bars CADL's regulation of firearms.

1. RELEVANT STATE FIREARMS STATUTE

Chapter 123 of the Michigan Compiled Laws pertains to local governmental affairs. It governs everything from the power of municipalities to operate a system of public recreation and playgrounds to their authority to establish and maintain garbage systems and waste plants. In 1990, the Legislature enacted MCL 123.1101 *et seq*. "to prohibit local units of government from imposing certain restrictions on the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols or other firearms, ammunition for pistols or other firearms, or components of pistols or other firearms." Title, 1990 PA 319.[1] MCL 123.1102 provides:

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[1] Although an act's title "is not to be considered authority for construing an act, it is useful for interpreting the purpose and scope of the act." *Mich Coalition*, 256 Mich App at 409 n 6.

> A local unit of government shall not impose special taxation on, enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols or other firearms, ammunition for pistols or other firearms, or components of pistols or other firearms, except as otherwise provided by federal law or a law of this state.

In MCL 123.1101(a), the Legislature defined the phrase "local unit of government" to mean "a city, village, township, or county." Notably, CADL is not owned by a city, village, township, or county. Rather, it is jointly established by a both a city and a county. As stated earlier, it is a district library established pursuant to the DLEA. MCL 397.173. When two or more municipalities unite to establish a district library together, they create an "authority" that is separate and apart from the constituent municipalities. *Jackson Dist Library v Jackson Co*, 428 Mich 371, 382; 408 NW2d 801 (1987). Thus, as a district library, CADL is not expressly barred by MCL 123.1102 from imposing firearms regulations. The analysis, however, does not stop there. Because we are dealing with regulation by a governmental agency in an area that is regulated by the state, we are bound to apply Michigan's doctrine of field preemption in determining whether the state has occupied the field of gun regulation to the exclusion of other local units of government such as a district library.

2. DISTRICT LIBRARIES ARE QUASI-MUNICIPAL CORPORATIONS SUBJECT TO PREEMPTION

Although district libraries have the authority to adopt bylaws and regulations and do any other thing necessary for conducting the district-library service, as stated earlier, this Court has held that a district library is a quasi-municipal corporation, i.e., a governmental

agency authorized by constitution or statute to operate for and about the business of the state. *Jackson Dist Library v Jackson Co #1*, 146 Mich App 392, 396; 380 NW2d 112 (1985), citing *Attorney General ex rel Kies v Lowrey*, 131 Mich 639, 643; 92 NW 289 (1902). "[T]he term 'municipal corporation' may be used in the broad sense to include . . . quasi-municipal corporations." *Huron-Clinton Metro Auth v Attorney General*, 146 Mich App 79, 82; 379 NW2d 474 (1985). Quasi-municipal corporations "possess and can exercise only such powers as are granted in express words or those necessarily and fairly implied in or incident to powers expressly conferred by the Legislature." *Id.* As previously discussed, the DLEA gives CADL's board the authority to adopt regulations that govern the library, to supervise and control library property, and to do any other thing necessary to conduct the CADL district-library service. MCL 397.182(1).

Nevertheless, a quasi-municipal corporation such as a district library remains subject to the Constitution and the laws of this state. See *Detroit Sch Dist Bd of Ed v Mich Bell Tel Co*, 51 Mich App 488, 494-495; 215 NW2d 704 (1974) (explaining that a school district, a quasi-municipal corporation, is a state agency that is subject to the Constitution and laws of the state); *Lowrey*, 131 Mich at 644 ("The school district is a State agency. Moreover, it is of legislative creation. It is true that it was provided for in obedience to a constitutional requirement; and whatever we may think of the right of the district to administer in a local way the affairs of the district, under the Constitution, we cannot doubt that such management must be in conformity to the provisions of such laws of a general character as may from time to time be passed . . . ."); see also generally *Llewellyn*, 401 Mich at 321 ("Under Const 1963, art 7, § 22, a Michigan municipality's power to adopt resolutions and

ordinances relating to municipal concerns is 'subject to the Constitution and law'."). Indeed, state law may preempt a regulation by any inferior level of government that attempts to regulate the same subject matter as a higher level of government. See *McNeil v Charlevoix Co*, 275 Mich App 686, 697 & n 11; 741 NW2d 27 (2007). "Thus, although we deal here with a regulation promulgated by a local administrative agency, application of the principles developed in determining the validity of local ordinances in light of statutory enactments on the same or similar subject matter is appropriate." *Id.* at 697 n 11.

3. APPLICATION OF *LLEWELLYN* FACTORS IN ASSESSING STATE PREEMPTION IN A REGULATED FIELD

A state statutory scheme preempts regulation by a lower-level governmental entity when either of two conditions exist: (1) the local regulation directly conflicts with the state statutory scheme or (2) the state statutory scheme occupies the field of regulation that the lower-level government entity seeks to enter, "even where there is no direct conflict between the two schemes of regulation."[2] *Llewellyn*, 401 Mich at 322; see also *Ter Beek*, 297 Mich App at 453; *Mich Coalition*, 256

[2] With all due respect to our learned colleague in dissent, her analysis fails to acknowledge the fact that *Llewellyn* is binding precedent, which we as an intermediate court may not choose to disregard or rebuff. As such, the dissent avoids the required application and analysis of field preemption. It is a tautology to say that because the Legislature did not expressly include district libraries in its definition of local units of government as set forth in MCL 123.1101(a), it must have specifically intended not to occupy the field of gun regulation when it comes to the presence of guns in district libraries. While cases often rise and fall on the plain language of a statute, because this matter entails regulation by a lower-level governmental entity in an area that is regulated by the state, it is not a statutory-interpretation case. Such a simplistic analysis would render the doctrine of field preemption a nullity, which it is not.

Mich App at 408. CADL's weapons ban does not directly conflict with Michigan's statutory scheme pertaining to gun regulation because no Michigan statute expressly prohibits district libraries from regulating weapons. To determine whether field preemption applies, i.e. whether the state has occupied the field of regulation that CADL seeks to enter in this case, we must evaluate the law using the guidelines set forth by our Michigan Supreme Court in *Llewellyn*:

> First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted.
>
> Second, pre-emption of a field of regulation may be implied upon an examination of legislative history.
>
> Third, the pervasiveness of the state regulatory scheme may support a finding of pre-emption. While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-emption.
>
> Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.
>
> As to this last point, examination of relevant Michigan cases indicates that where the nature of the regulated subject matter calls for regulation adapted to local conditions, and the local regulation does not interfere with the state regulatory scheme, supplementary local regulation has generally been upheld.
>
> However, where the Court has found that the nature of the subject matter regulated called for a uniform state regulatory scheme, supplementary local regulation has been held pre-empted. [*Llewellyn*, 401 Mich at 323-325 (citations omitted).]

With regard to the first *Llewellyn* guideline—whether state law expressly provides that the state's

authority to regulate in the area of firearm possession is to be exclusive and preemptive of municipal regulation—we concluded in *Mich Coalition* that MCL 123.1102 did so clearly, albeit indirectly. *Mich Coalition*, 256 Mich App at 413-414. In *Mich Coalition*, the city of Ferndale enacted an ordinance that prohibited the possession or concealment of a weapon in all buildings in Ferndale that were owned or controlled by the city, including city hall, fire stations, and the library. *Id*. at 402-403, 412. This Court held that, while stated in the negative rather than the affirmative, the state made a clear policy choice to occupy the field of firearm regulation to the exclusion of local units of government:

> With the pronouncement in [MCL 123.1102], *the Legislature stripped local units of government of all* authority to regulate firearms by ordinance or otherwise with respect to the areas enumerated in the statute, except as particularly provided in other provisions of the act and unless federal or state law provided otherwise. Unlike some other statutes, [MCL 123.1102] does not use language to the effect that the act "occupies the whole field of regulation," but rather *expressly removes the power of local units of government to regulate in the field. The effect is to occupy the field to the exclusion of local units of government.* In other words, although stated in the negative, rather than the affirmative, the statutory language of [MCL 123.1102] demonstrates that, in effect, *state law completely occupies the field of regulation* that the Ferndale ordinance seeks to enter, to the exclusion of the ordinance, although subject to limited exceptions. See *Llewellyn*, [401 Mich at 322]. With the enactment of [MCL 123.1102], the Legislature made a *clear policy choice to remove from local units of government the authority to dictate where firearms may be taken*.
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> * * *
>
> [T]he language of [MCL 123.1102] is broad and all-encompassing. A state statute that prohibits a local unit of

> government from enacting "any ordinance or regulation" or regulating "in any other manner" the transportation or possession of firearms cannot reasonably be interpreted to exclude local ordinances that address the carrying of firearms in municipal buildings. [*Id*. at 413-414 (emphasis added)].

This Court held that the Ferndale ordinance was preempted by MCL 123.1102, and "[b]ecause the net effect of [MCL 123.1102] is to completely occupy the field," it found it unnecessary to address the other *Llewellyn* factors. *Id*. at 414 n 12. However, because a district library is not included in the statute's definition of a local unit of government, and even though there is no direct conflict between the two schemes of regulation, we must continue to evaluate the *Llewellyn* factors to ascertain whether the state's preemption in the field of gun regulation extends to district libraries. See *Llewellyn*, 401 Mich at 322.

Llewellyn's second guideline in determining whether state law preempts the field of regulation that CADL seeks to enter requires us to examine legislative history. *Llewellyn*, 401 Mich at 323. When the Legislature enacted MCL 123.1102, the House Legislative Analysis Section indicated that House Bill 5437 was designed to address the "proliferation of local regulation regarding firearm ownership, sale, and possession" and the "concern that continued local authority to enact and enforce gun control ordinances may result in the establishment of a patchwork of ordinances." House Legislative Analysis, HB 5437, January 30, 1991, p 1. As mentioned earlier, the title of 1990 PA 319 states that the act was designed to prohibit local units of government from imposing restrictions in the area of firearms regulation. Although not included in the definition of "local unit of government" set forth in MCL 123.1101(a), a district library is nevertheless a local unit of government.

Excluding a district library from the field of regulation—simply because it is established by *two* local units of government instead of one—defies the purpose of the statute and would undoubtedly lead to patchwork regulation. Every district library in the state of Michigan could enact its own unique rules and regulations regarding firearms possession, leaving to the public the obligation of determining where they can bring—or avoid—guns.[3] Thus, while the express language of the statute fails to include a district library in its definition of local units of government, the legislative history supports a finding that the purpose of the statute would only be served by leaving it to the state to regulate firearm possession in all buildings established by local units of government, including district libraries.

The third guideline set forth in *Llewellyn* requires us to examine the pervasiveness of the state regulatory scheme. In addition to the Legislature's enactment of MCL 123.1102, the Legislature's statutory scheme regarding firearm regulation addresses who may possess a firearm and how, when, and where a firearm may be possessed. Subject to exceptions for certain individuals, MCL 750.234d(1) prohibits a person from possessing a firearm on the premises of any of the following: depository financial institutions, churches or other places of religious worship, courts, theatres, sports arenas, day-care centers, hospitals, and establishments licensed under the former Michigan Liquor Control Act. With the exception of certain individuals, MCL 750.237a(4)

[3] As established by MCL 123.1102 and *Mich Coalition*, all public libraries that are owned by cities, villages, and townships are currently preempted from regulating firearms. Thus, the issue is essentially whether legislative history supports a finding that the state intended to occupy the field of regulation to the exclusion of local units of government *except for* district libraries, which are established by two or more local units of government.

prohibits the possession of a weapon in a weapon-free school zone, which is defined as "school property and a vehicle used by a school to transport students to or from school property." MCL 750.237a(6)(d). Subject to certain exceptions, MCL 28.425o(1) prohibits a person who is licensed to carry a concealed pistol from carrying a concealed pistol on the premises of any of the following: a school or school property; a public or private child-care center, daycare center, child-caring institution, or child-placing agency; a sports arena or stadium; a bar or tavern licensed under the Michigan Liquor Control Code, MCL 436.1101 *et seq*.; any property or facility owned by a church or other place of worship; certain entertainment facilities falling within MCL 28.425o(1)(f); a hospital; and a dormitory or classroom of a college or university.

In addition to the above laws addressing where firearms may not be possessed, state law also prohibits the following, subject to certain exceptions: the possession of a machine gun or firearm that shoots or is designed to shoot automatically more than one shot without manual reloading, by a single function of the trigger, MCL 750.224; the possession of a short-barreled shotgun or a short-barreled rifle, MCL 750.224b; the possession of a firearm by a felon, MCL 750.224f; the carrying of a firearm with the intent to use it illegally against another person, MCL 750.226; the carrying of a concealed weapon without a license to do so, MCL 750.227; the possession of a firearm during the commission of a felony, MCL 750.227b; the possession of a loaded firearm, other than a pistol, in or upon a sailboat or a motor vehicle, aircraft, motorboat, or any other vehicle propelled by mechanical means, MCL 750.227c; the possession of a loaded firearm, other than a pistol, in or upon a motor vehicle or any self-propelled vehicle designed for land travel if the firearm is not taken

down, enclosed in a case, carried in the trunk of the vehicle, or inaccessible from the interior of the vehicle, MCL 750.227d; intentionally aiming or pointing a firearm at or toward another person, MCL 750.233; knowingly brandishing a firearm in public, MCL 750.234e; a minor's possession of a firearm in public, MCL 750.234f; and possessing a firearm while under the influence of alcohol or a controlled substance, MCL 750.237(1). Finally, the Legislature has established a standardized system for Michigan residents to obtain a license to carry a concealed pistol. See *Mich Coalition*, 256 Mich App at 410-411; MCL 28.421a through 28.435.

As can be gleaned from these numerous statutes included in the Legislature's statutory scheme regulating firearms, the statutory scheme includes "a broad, detailed, and multifaceted attack" on the possession of firearms. *Llewellyn*, 401 Mich at 326. The extent and specificity of this statutory scheme, coupled with the Legislature's "clear policy choice [in MCL 123.1102] to remove from local units of government the authority to dictate where firearms may be taken," *Mich Coalition*, 256 Mich App at 414, demonstrates that the Legislature has occupied the field of firearm regulation that the library's weapons policy attempts to regulate: the possession of firearms.

This conclusion is supported by consideration of the fourth *Llewellyn* guideline: whether the nature of the regulated subject matter demands exclusive state regulation "to achieve the uniformity necessary to serve the state's purpose or interest." *Llewellyn*, 401 Mich at 324. The regulation of firearm possession undoubtedly calls for such exclusive state regulation. If the state prevents all public libraries established by a city, village, township, or county from passing their own firearms regulations but does not similarly prevent district libraries from doing so,

it would result in a "Balkanized patchwork of inconsistent local regulations." See *City of Brighton v Hamburg Twp*, 260 Mich App 345, 355; 677 NW2d 349 (2004). In such a case, citizens of this state would be subject to varying and possibly conflicting regulations regarding firearms and "a great deal of uncertainty and confusion would be created." *Llewellyn*, 401 Mich at 327. It would be extremely difficult for firearm owners to know where and under what circumstances they could possess a gun and just as difficult for other members of the public to know what libraries to avoid should they wish not to be around guns. An exclusive, uniform state regulatory scheme for firearm possession is far more efficient for purposes of obedience and enforcement than a patchwork of local regulation.

Accordingly, we hold that state law preempts CADL's weapons policy because the Legislature, through its statutory scheme in the field of firearm regulation, has completely occupied the field that CADL's weapons policy attempts to regulate.[4] The trial court, therefore, erroneously granted summary disposition in favor of CADL on the basis that the weapons policy was valid as a matter of law. Furthermore, we hold that the trial court abused its discretion by granting CADL's request for permanent injunctive relief, i.e., by permanently enjoining MOC, its members, their agents, and members of the public from entering CADL's buildings and branches while openly carrying a weapon in violation of CADL's weapons policy.

IV. CONCLUSION

We conclude that state law preempts CADL's weapons policy to the extent that it attempts to regulate

[4] In light of this conclusion, we do not address the remaining issues raised by the parties on appeal.

firearms contrary to the restrictions set forth in MCL 123.1102. The library is a quasi-municipal corporation and, thus, a governmental agency subject to the principles of preemption when it attempts to regulate subject matter that is regulated by the Legislature. The Legislature, through MCL 123.1102, has expressly prohibited local government regulation of firearms and ammunition generally in cities, villages, townships, and counties, including in their libraries. Although a district library is not a local unit of government as defined by MCL 123.1101(a), legislative history, the pervasiveness of the Legislature's regulation of firearms, and the need for exclusive, uniform state regulation of firearm possession as compared to a patchwork of inconsistent local regulations indicate that the Legislature has completely occupied the field that CADL seeks to enter. Certainly, at a time where this country has witnessed tragic and horrific mass shootings in places of public gathering, the presence of weapons in a library where people of all ages—particularly our youth—gather is alarming and an issue of great concern. However, because of field preemption, the same regulations that apply to public libraries established by one local unit of government apply to those established by two or more local units of government—leaving the matter to the state.

We reverse the trial court's judgment upholding CADL's weapons policy to the extent that it attempts to regulate firearms contrary to the restrictions set forth in MCL 123.1102 and vacate the trial court's order granting permanent injunctive relief.

SAAD, J., concurred with BECKERING, J.

GLEICHER, P.J. (*concurring in part and dissenting in part*). I concur with the majority's determination that the Capital Area District Library is not a "local unit of

government" as defined in MCL 123.1101(a) and that the library's weapons policy is permitted by the District Library Establishment Act, MCL 397.171 *et seq*. Precisely because the library is not a local unit of government and has promulgated a policy falling squarely within its rulemaking authority, I respectfully dissent from the majority's conclusion that the field-preemption doctrine nullifies the plain language of the relevant statutes.

The majority's field-preemption analysis flows from MCL 123.1102, which states:

> A local unit of government shall not impose special taxation on, enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols or other firearms, ammunition for pistols or other firearms, or components of pistols or other firearms, except as otherwise provided by federal law or a law of this state.

This statute applies to "a local unit of government." The Legislature specifically defined that term to mean "a city, village, township, or county." MCL 123.1101(a). Conspicuously absent from this definition is a district library or an authority.[1] Thus, a district library is not subject to MCL 123.1102, which prohibits local units of government from enacting or enforcing any regulations pertaining to the possession of firearms.[2]

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[1] A district library constitutes "an authority separate and apart from either the city or the county" for the purpose of taxation. *Jackson Dist Library v Jackson Co*, 428 Mich 371, 378; 408 NW2d 801 (1987).

[2] The Legislature has elsewhere defined the term "local unit of government" far more expansively than it chose to do in MCL 123.1101(a). For example, MCL 324.20101(bb) defines the term to mean "a county, city, township, or village, an agency of a local unit of government, an authority or any other public body or entity created by or pursuant to state law." Under MCL 257.811i(4)(*i*), a "local unit of government" includes "[a]n

Fundamentally, field preemption is a question of legislative intent. See *Walsh v River Rouge*, 385 Mich 623, 639; 189 NW2d 318 (1971). Application of the doctrine requires a court to examine sources and values outside the statutory text to divine whether the Legislature intended to occupy a field of regulation. But the Michigan Supreme Court has repeatedly emphasized that the Legislature's intent in drafting an unambiguous statute is to be gleaned only from the words contained in the text. "[C]ourts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature." *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). This is so because "[a]ny other nontextual approach to statutory construction will necessarily invite judicial speculation regarding the probable, but unstated, intent of the Legislature with the likely consequence that a court will impermissibly substitute its own policy preferences." *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999) (quotation marks and citation omitted). This commitment to the statutory text is not merely a matter of history or prudence; instead, it constitutes a bedrock principle of separation of powers. See *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 406-407; 738 NW2d 664 (2007); *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 758-759; 641 NW2d 567 (2002). Simply put, "our judicial role precludes imposing different policy choices than those selected by the Legislature . . . ." *Robertson*, 465 Mich at 759 (quotation marks and citation omitted).

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authority or other public body created by or pursuant to state law." MCL 169.209(6) states, " 'Local unit of government' means a district, authority, county, city, village, township, board, school district, intermediate school district, or community college district." The recent amendment of MCL 169.209 left that definition unchanged. See 2012 PA 275, effective January 1, 2013.

In this case, the majority rejects that the plain words of the statute mean what they say. In so ruling, the majority ignores the text and instead divines from highly selective legislative history and the majority's own notion of public good that the Legislature intended to prohibit district libraries from banning firearms on their premises. In my view, the plain language of MCL 123.1101(a) belies the majority's field-preemption analysis. The Legislature limited the reach of MCL 123.1102 to firearm regulations enacted by cities, villages, townships and counties. To read into that list district libraries or authorities is to cast aside the clearest possible expression of legislative will in the interest of rewriting the statute.

Applied as written, the words of MCL 123.1101(a) and MCL 123.1102 preclude only cities, villages, townships, and counties from regulating firearm possession. Because "[t]he most reliable indicator of the Legislature's intent is the words in the statute," *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011), we must presume that the Legislature purposefully selected the entities it included in the term "local unit of government" and elected not to incorporate in the definition district libraries or authorities. "[T]he search for legislative intent begins and ends in the language of the statute." *People v Morton*, 423 Mich 650, 655; 377 NW2d 798 (1985). Accordingly, this Court should simply apply MCL 123.1101(a) and MCL 123.1102 in accordance with their obvious meaning. Doing so compels the conclusion that the Legislature did not intend to extinguish the ability of district libraries and authorities to regulate firearms.

Despite the clarity of the statutes at issue, the majority embarks on a journey through the thicket of preemption to find the library's policy illegal. By apply-

ing the field-preemption doctrine to this case, I believe that the majority has strayed from its task of interpreting rather than making law. "Where the statute unambiguously conveys the Legislature's intent, 'the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case.' " *Dep't of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008) (citation omitted). Rather than confining its analysis to the statutory text, the majority discerns legislative "policy" from legislative history and the existence of other firearm-related statutes and concludes that the Legislature intended to extinguish local regulation addressing firearms. This "intent" is certainly not expressed in the statute. To the extent the majority employs the field-preemption doctrine as a vehicle for ignoring the statutory text, I respectfully submit that the majority has erred.

Federal preemption doctrines emanate from the Supremacy Clause of the United States Constitution, which provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ." US Const, art VI, § 2. "Field preemption does not rest on an express congressional provision, or a conflict between federal and state law, but instead occurs 'if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.' " *Wisconsin Central, Ltd v Shannon*, 539 F3d 751, 762 (CA 7, 2008), quoting *Cipollone v Liggett Group, Inc*, 505 US 504, 516; 112 S Ct 2608; 120 L Ed 2d 407 (1992) (quotation marks and citations omitted). "Where . . . the field which Congress is said to have pre-empted includes areas that have been traditionally occupied by the States, congressional intent to supersede state laws must be clear and manifest." *English v Gen Electric Co*,

496 US 72, 79; 110 S Ct 2270; 110 L Ed 2d 65 (1990) (quotation marks and citations omitted).

Preemption under Michigan law derives from Const 1963, art 7, § 22, which declares:

> Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. *Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law.* No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section. [Emphasis added.][3]

In *People v Llewellyn*, 401 Mich 314, 323-324; 257 NW2d 902 (1977), our Supreme Court articulated a field-preemption analysis that considers four factors: (1) whether state law expressly preempts any further lawmaking, (2) whether preemption should be implied based on a court's examination of legislative history, (3) whether preemption may be implied from the "pervasiveness of [a] state regulatory scheme," and (4) whether "the nature of the regulated subject matter . . .

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[3] The majority does not address the legal basis for applying field-preemption analysis to a policy announced by a district library. Unquestionably, our Constitution sets forth a "supremacy clause" applicable to the "resolutions and ordinances" of cities and villages. Const 1963, art 7, § 22. Equally obvious is the fact that a governmental entity may not develop and enforce policies that violate Michigan law or federal law. By its nature, field preemption is an imprecise doctrine that seeks to discern, among other vague guideposts, whether a statutory scheme is "pervasive" and whether the legislative history speaks to an interest in uniform regulation. I question whether this Court should apply field-preemption analysis outside the realm of municipal law. Because the doctrine sweeps so broadly, it may displace perfectly "legal" rules and policies generated by myriad quasi-governmental agencies based on judicial notions of overriding interests.

demand[s] exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest." All these guidelines except the first invite judges to make policy choices. Alternatively stated, *Llewellyn*'s field-preemption methodology encourages courts to depart from the expressed statutory language and to instead decide cases based on "extratextual sources such as legislative testimony, the perceived intent of the Legislature, [or] overarching policy considerations . . . ." *Paige v Sterling Hts*, 476 Mich 495, 515; 720 NW2d 219 (2006).

The majority has unquestioningly accepted *Llewellyn*'s invitation, inferring preemption based on the majority's view of legislative history,[4] the majority's determination that the Legislature meant to occupy the field of firearm regulation even though it never said so, and the majority's opinion that statewide regulation would be preferable to permitting district libraries to prohibit guns. In reaching these conclusions, the majority has disregarded our Supreme Court's oft-repeated instruction that "our judicial role precludes imposing different policy choices than those selected by the Legislature[.]" *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012) (quotation marks and citations omitted).

When the Legislature has expressed the intent that state law supplant local regulation, courts must give effect to legislative will. But our Legislature has never expressly provided that it possesses an exclusive ability to regulate firearms. Instead, the Legislature enacted

[4] By way of legislative history, the majority cites House Legislative Analysis, HB 5437, January 30, 1991. Our Supreme Court has characterized a house legislative analysis as "a staff-prepared summary of the law . . . entitled to little judicial consideration in the construction of statutes." *Johnson v Recca*, 492 Mich 169, 188; 821 NW2d 520 (2012) (quotation marks and citation omitted).

an admittedly comprehensive statute prohibiting an expansive range of local regulations and specifically limited the reach of that statute to cities, villages, townships or counties. That limitation fully corresponds with an intent to preserve the authority of other quasi-governmental units to regulate firearms. Given that in MCL 123.1101(a) the Legislature unambiguously set forth the "field" relevant to MCL 123.1102, I discern no basis for applying field-preemption analysis. By doing so, the majority interposes judicial considerations above and beyond the words selected by the Legislature.

Czymbor's Timber, Inc v Saginaw, 478 Mich 348; 733 NW2d 1 (2007), illustrates a textually sensitive approach to field preemption. The allegedly preemptive statute in *Czymbor's Timber* was found in part 419 of the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*. It provided that the Department of Natural Resources "may regulate and prohibit hunting, and the discharge of firearms and bow and arrow . . . on those areas established under this part" in certain circumstances. MCL 324.41901(1). Saginaw enacted ordinances banning the discharge of firearms and arrows within city limits. *Czymbor's Timber*, 478 Mich at 350. The plaintiffs sought to hunt on their private land located within the city of Saginaw. They challenged the validity of the ordinances, contending that "because neither ordinance contains a hunting exception, the ordinances conflict with and are preempted by MCL 324.41901[.]" *Id.*

The Supreme Court observed that the Legislature specifically circumscribed the application of MCL 324.41901 to "property established under part 419." *Id.* at 356 (quotation marks omitted). Because plaintiffs had not made the requisite showing that their property

was a hunting area established under part 419, the Supreme Court declined to employ a preemption analysis. *Id.* at 357. In other words, the Supreme Court examined the statutory language before considering whether the Saginaw ordinances were preempted. Preemption analysis then became irrelevant, because the Legislature had specifically limited the statute's reach. *Czymbor's Timber* teaches that simple application of guiding statutory-construction principles may eliminate the relevance of field-preemption analysis. I suggest that the plain language of MCL 123.1101(a) similarly renders preemption analysis superfluous in this case.

By applying the *Llewellyn* guidelines, the majority disregards MCL 123.1101(a) and instead embarks on a judicial excursion into a dark cavern. The majority perceives a legislative intent not from the statutory text, which conclusively refutes any notion that the Legislature has expressly and solely occupied the field of firearm regulation. Rather, the majority concludes that the district library's weapons policy runs afoul of legislative history, contradicts a statutory scheme the majority characterizes as " 'a broad, detailed, and multifaceted attack' on the possession of firearms," contravenes a legislative "policy choice" gleaned from the majority's interpretation of legislative history and the statutory scheme, and violates the majority's view that "regulation of firearm possession undoubtedly calls for . . . exclusive state regulation." Thus, the majority imposes on clear and unambiguous statutory language its view of what the law *should* be, despite that the text clearly states otherwise.

We may not presume that the Legislature mistakenly or inadvertently omitted district libraries or authorities from the definition of "a local unit of government."

When "statutory language is certain and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute[.]" *People v Monaco*, 474 Mich 48, 58; 710 NW2d 46 (2006) (quotation marks and citation omitted). The rules governing statutory construction also forbid this Court from deducing that the Legislature "mistakenly utilized one word or phrase instead of another." *Chaney v Dep't of Transp*, 447 Mich 145, 165; 523 NW2d 762 (1994). Nor may courts "assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Peltola*, 489 Mich at 185 (quotation marks and citation omitted); see also *Reichert v Peoples State Bank for Savings*, 265 Mich 668, 672; 252 NW 484 (1934) ("It is to be assumed that the legislature . . . had full knowledge of the provisions of [the relevant statutes] and we have no right to enter the legislative field and, upon assumption of unintentional omission . . . , supply what we may think might well have been incorporated.").

This case illustrates that when applied in a manner untethered to the text, the *Llewellyn* guidelines empower judges to inject their own policy preferences into the task of statutory construction. Given the clarity of the statutes here at issue, the majority's determination that the Legislature meant to preempt the field of firearm regulation turns on *judicial* opinions unmoored from the actual words selected by the Legislature. Whether "[a]n exclusive, uniform state regulatory scheme for firearm possession is far more efficient for purposes of obedience and enforcement than a patch-

work of local regulation" is not our concern. Nor are the pros and cons of openly carrying weapons into a place devoted to quiet reading and study. Our only task is to apply well-established legal principles to the task of interpreting a statute. In my view, the statute is susceptible to only one interpretation, and that interpretation compels us to affirm the circuit court.[5]

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[5] The majority characterizes as "simplistic" my view that the judicially created implied field-preemption doctrine may not circumvent plain statutory language. I readily agree that the fundamental rule of statutory construction at the heart of this case is a simple one. The Supreme Court has repeatedly instructed that "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature *as derived from the words of the statute itself*." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002) (emphasis added). To the extent that the majority's application of the field-preemption doctrine requires psychoanalyzing the Legislature to find a preemptive intent, the majority has contravened this bedrock principle. See *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 582; 702 NW2d 539 (2005) ("Statutory . . . language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court."); *Halloran v Bhan*, 470 Mich 572, 579; 683 NW2d 129 (2004) ("As we have invariably stated, the argument that enforcing the Legislature's plain language will lead to unwise policy implications is for the Legislature to review and decide, not this Court."); *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 165; 680 NW2d 840 (2004) ("An analysis . . . that is in conflict with the actual language of the law and predicated on some supposed 'true intent' is necessarily a result-oriented analysis. In other words, it is not a legal analysis at all."), and countless other cases. Nor have I chosen to "disregard or rebuff" *Llewellyn*. When a statute explicitly defines the field of its reach, use of the *implied* field-preemption doctrine described in *Llewellyn* violates the canons of statutory construction and any application of *Llewellyn* is unjustified.

COVENTRY PARKHOMES CONDOMINIUM ASSOCIATION v FEDERAL NATIONAL MORTGAGE ASSOCIATION

Docket No. 304188. Submitted October 10, 2012, at Detroit. Decided October 25, 2012 at 9:05 a.m. Leave to appeal sought.

Coventry Parkhomes Condominium Association brought an action in the Oakland Circuit Court against the Federal National Mortgage Association (FNMA) to foreclose on a lien it had imposed on Denise Walsh for unpaid condominium-association fees and dues. Walsh had purchased a unit in Coventry's condominium complex pursuant to a mortgage agreement with JP Morgan Chase Bank, N.A., which later assigned its interest in the mortgage to FNMA. The mortgage was recorded in 2005, Coventry's lien was recorded in 2009, and the assignment of the mortgage to FNMA was made and recorded in 2010. The court, Denise Langford Morris, J., granted summary disposition in favor of Coventry, concluding that Coventry's lien had priority over the mortgage assigned to FNMA and that FNMA was liable to Coventry for $16,980.98 in unpaid assessments, late fees and charges, interest, and costs of collection. FNMA appealed.

The Court of Appeals *held*:

1. The trial court erred by concluding that Coventry's lien had priority over FNMA's mortgage. Under the Condominium Act, MCL 559.101 *et seq*., a first mortgage of record has priority over a condominium-association lien if the first mortgage of record was recorded before the condominium-association lien. Although the Condominium Act does not define "first mortgage of record," MCL 559.110(1) defines "record" as to record pursuant to the laws of this state relating to the recording of deeds, and the common meaning of "first" is being before all others with respect to time, order, rank, or importance. Accordingly, the plain meaning of "first mortgage of record" as used in MCL 559.208(1) is the mortgage that is recorded before all others with respect to time pursuant to the laws of this state relating to the recording of deeds. Walsh's mortgage to Chase was the first mortgage of record under MCL 559.208(1), and it was recorded before Coventry's lien was recorded. Even though Chase assigned its interest in the mortgage to FNMA, the

mortgage was still the first mortgage of record because it was recorded before any other mortgage pursuant to the laws of this state relating to the record of deeds. Thus, notwithstanding the assignment to FNMA, the mortgage had priority over Coventry's lien. The fact that MCL 559.208(1) does not mention assignments or assignees did not support a conclusion that the assigned mortgage was subordinate to the condominium-association lien under the principle of *expressio unius est exclusio alterius* given that the mortgage assigned to FNMA was a first mortgage of record recorded before Coventry's lien under the plain language of MCL 559.208(1).

2. FNMA was not liable to Coventry under MCL 559.211, which provides that upon the sale or conveyance of a condominium unit, all unpaid assessments, interest, late charges, fines, costs, and attorney fees against a condominium unit generally must be paid out of the sale price or by the purchaser in preference over any other assessments or charges. Although FNMA, as an assignee of a mortgage, was a "purchaser" as that term is defined under MCL 565.34, that definition applies only to chapter 565 of the Michigan Complied Laws. Moreover, MCL 559.211 applies only upon the sale or conveyance of a condominium unit, whereas the present case involved only the obtainment of a security interest in a condominium unit through the assignment of a mortgage.

Reversed.

CONDOMINIUMS — MORTGAGES — LIENS — PRIORITY OF CONDOMINIUM-ASSOCIATION LIENS — FIRST MORTGAGES OF RECORD — ASSIGNMENTS.

The Condominium Act, MCL 559.101 *et seq*., provides that a first mortgage of record has priority over a condominium-association lien if the first mortgage of record was recorded before the condominium-association lien; a first mortgage of record for purposes of the Condominium Act is a mortgage that is recorded before all others with respect to time pursuant to the laws of this state relating to the recording of deeds; the assignment of a first mortgage of record does not affect its priority under the Condominium Act (MCL 559.208[1]).

Meisner & Associates, P.C. (by *Robert M. Meisner*, *Daniel P. Feinberg*, and *Brian R. Harris*), for plaintiff.

Orlans Associates, P.C. (by *Justin F. Carter*), for defendant.

Amicus Curiae:

Alexander, Zelmanski, Danner & Fioritto, PLLC (by *D. Douglas Alexander* and *Corene C. Ford*), for the Community Associations Institute.

Before: O'CONNELL, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM. In this priority dispute between plaintiff, Coventry Parkhomes Condominium Association, and defendant, Federal National Mortgage Association (FNMA), FNMA appeals by right the circuit court's order granting Coventry's motion for summary disposition under MCR 2.116(C)(10). We reverse.

I

On July 29, 2005, Denise Walsh, a coowner of a unit in Coventry's condominium complex, entered into a mortgage agreement with JP Morgan Chase Bank, N.A. (Chase), and the mortgage was recorded on August 18, 2005. On June 17, 2009, Coventry recorded a lien on Walsh's condominium unit for unpaid association fees and dues. On July 20, 2010, Chase assigned its interest in the mortgage to FNMA. FNMA recorded the assignment on September 9, 2010.

On November 10, 2010, Coventry initiated the instant action against FNMA to foreclose on its condominium-association lien and to obtain from FNMA unpaid condominium assessments and fees in the amount of $5,673.10, plus late charges and fines. On February 8, 2011, Coventry moved the circuit court for summary disposition under MCR 2.116(C)(10). Coventry argued that, under the Condominium Act, MCL 559.101 *et seq.*, its lien had priority over the mortgage

assigned to FNMA and FNMA was liable to Coventry for all unpaid assessments, fees, late charges, interest, and attorney fees levied against Walsh's condominium unit. In response, FNMA argued that it was entitled to summary disposition under MCR 2.116(I)(2), insisting that its mortgage had priority over Coventry's lien and that it was not liable to Coventry for dues and assessments because FNMA was merely a holder of a security interest and not a coowner of Walsh's condominium unit.

After a hearing, the circuit court granted summary disposition in favor of Coventry, concluding that Coventry's lien had priority over the mortgage assigned to FNMA and that FNMA was liable to Coventry for $16,980.98 in unpaid assessments, late fees and charges, interest, and costs of collection. FNMA appeals the circuit court's order, as previously discussed.

II

The sole issue before this Court is whether the circuit court erroneously granted summary disposition in favor of Coventry, concluding that Coventry's lien had priority over the mortgage assigned to FNMA and that FNMA was liable to Coventry for unpaid assessments, late fees and charges, interest, and costs of collection.

We review de novo a trial court's summary-disposition ruling. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *The Cadle Co v City of Kentwood*, 285 Mich App 240, 247; 776 NW2d 145 (2009). A motion for summary disposition under MCR 2.116(C)(10) may be granted if

there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Campbell v Dep't of Human Servs*, 286 Mich App 230, 235; 780 NW2d 586 (2009). Furthermore, "[s]tatutory interpretation is a question of law that we review de novo on appeal." *Johnson v QFD, Inc*, 292 Mich App 359, 364; 807 NW2d 719 (2011).

" 'Michigan is a race-notice state, and owners of interests in land can protect their interests by properly recording those interests.' " *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006), quoting *Lakeside Assoc v Toski Sands*, 131 Mich App 292, 298; 346 NW2d 92 (1983). "Under MCL 565.29, the holder of a real estate interest who first records his or her interest generally has priority over subsequent purchasers." *Id.* MCL 565.29 provides as follows, in pertinent part:

> Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.

Thus, a later interest holder may take priority over a prior conveyed interest only if the later interest holder takes in "good faith." "A good-faith purchaser is one who purchases without notice of a defect in the vendor's title." *Mich Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992). Notice can be actual or constructive. *Richards*, 272 Mich App at 539. Constructive notice "is notice that is imputed to a person concerning all matters properly of record . . . ." *Id.* at 540 (citation and quotation marks omitted).

It is well established that an assignee stands in the shoes of an assignor, acquiring the same rights and

being subject to the same defenses as the assignor. See, e.g., *Nichols v Lee*, 10 Mich 526, 528-529 (1862); *Burkhardt v Bailey*, 260 Mich App 636, 652-653; 680 NW2d 453 (2004); *Prof Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998); *First of America Bank v Thompson*, 217 Mich App 581, 587; 552 NW2d 516 (1996). "When a mortgage is assigned, the assignee, for all beneficial purposes claimed under it by him, becomes a party to the mortgage, and stands in the place of the mortgagee . . . ." *Nichols*, 10 Mich at 528; see also *Burkhardt*, 260 Mich App at 653.

Moreover, Michigan caselaw illustrates that a mortgage assignee has the same priority rights as the original mortgage assignor. See *Wilson v Campbell*, 110 Mich 580; 68 NW 278 (1896). In *Wilson*, Freeling H. Potter granted a first mortgage to E. E. White on January 27, 1886. White assigned the mortgage to the defendant, Elizabeth Campbell, on June 14, 1887. Potter then sold the mortgaged property to the complainant, Robert Wilson, on October 3, 1888. On April 1, 1892, Wilson granted a second mortgage on the property to Michigan Mortgage Company, Limited, which then assigned the mortgage to Mrs. John Nichols on April 27, 1892. On April 13, 1894, Campbell recorded her assignment of the first mortgage. *Id*. at 581-583. The Michigan Supreme Court held that Campbell's mortgage had priority over Nichols's mortgage. *Id.* at 589. The Court opined, in pertinent part:

> The question of priority between the mortgages of Mrs. Nichols and [Mrs. Campbell] is also involved. The mortgage of Mrs. Campbell was prior in point of time, and was duly recorded. . . . [Mrs. Nichols] undoubtedly assumed that there was no prior incumbrance. Had she examined the record, she would have discovered a mortgage to Mr. White. She must, therefore, be held bound by notice of this. The

> case is certainly not stronger for her than it would have been had White become the purchaser of the land, and attempted to convey or incumber the fee. Having constructive knowledge of the existence of this mortgage, *Mrs. Nichols was also chargeable in law with the further notice that the mortgage is a lien in the hands of any person to whom it may have been legally transferred, and that the record of such transfer is not necessary to its validity, nor as a protection against the purchaser of the property mortgaged, or any other person than a subsequent purchaser in good faith of the mortgage itself or the note or debt secured by it*, but, rather, that one purchasing the premises from the mortgagee would take them subject to the lien of the mortgage, irrespective of the ownership of it, unless the mortgagee was the owner. [*Id.* at 588-589 (emphasis added).]

Notwithstanding Michigan's race-notice scheme and the caselaw regarding assignments, the parties agree that the Condominium Act governs the priority dispute in this case. MCL 559.208(1) of the Condominium Act states the following with respect to priority:

> *Sums assessed to a co-owner by the association of co-owners that are unpaid together with interest on such sums, collection and late charges, advances made by the association of co-owners for taxes or other liens to protect its lien, attorney fees, and fines in accordance with the condominium documents, constitute a lien upon the unit or units in the project owned by the co-owner at the time of the assessment before other liens except* tax liens on the condominium unit in favor of any state or federal taxing authority and *sums unpaid on a first mortgage of record, except that past due assessments that are evidenced by a notice of lien recorded as set forth in subsection (3) have priority over a first mortgage recorded subsequent to the recording of the notice of lien.* The lien upon each condominium unit owned by the co-owner shall be in the amount assessed against the condominium unit, plus a proportionate share of the total of all other unpaid assessments attributable to condominium units no longer owned by the co-owner but which

> became due while the co-owner had title to the condominium units. The lien may be foreclosed by an action or by advertisement by the association of co-owners in the name of the condominium project on behalf of the other co-owners. [Emphasis added.]

The plain language of MCL 559.208(1) indicates that a "first mortgage of record" has priority over a condominium-association lien if the "first mortgage of record" was recorded before the condominium-association lien. This is consistent with Michigan's race-notice scheme. However, a condominium-association lien would have priority over a second mortgage even if the second mortgage was recorded before the condominium-association lien. In this respect, MCL 559.208(1) departs from Michigan's race-notice scheme.

The Condominium Act does not define "first mortgage of record." When interpreting the Condominium Act, we adhere to well-established principles of statutory interpretation:

> The primary goal of statutory construction is to give effect to the Legislature's intent. This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted. When reviewing a statute, all non-technical words and phrases shall be construed and understood according to the common and approved usage of the language, and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal. [*McCormick v Carrier*, 487 Mich 180, 191-192; 795 NW2d 517 (2010) (citations and quotation marks omitted).]

The act defines "record" as "to record pursuant to the laws of this state relating to the recording of deeds . . . ." MCL 559.110(1). The common meaning of

"first" is "being before all others with respect to time, order, rank, importance, etc." *Random House Webster's College Dictionary* (2001). Accordingly, the plain meaning of "first mortgage of record" as used in MCL 559.208(1) is the mortgage that is recorded before all others with respect to time pursuant to the laws of this state relating to the recording of deeds.

In the present case, Walsh's mortgage to Chase was the first mortgage of record under MCL 559.208(1). It was recorded pursuant to the laws of this state relating to the recording of deeds before any other mortgage. Furthermore, it was recorded before Coventry's lien was recorded. Even though Chase assigned its interest in the mortgage to FNMA, the mortgage was still the first mortgage of record because it was recorded before any other mortgage pursuant to the laws of this state relating to the record of deeds. And it was still a first mortgage of record recorded before Coventry's lien was recorded. The assignment to FNMA did not change this. Thus, notwithstanding the assignment to FNMA, the mortgage had priority over Coventry's lien because it was a first mortgage of record recorded before Coventry's lien was recorded. Nothing in the text of MCL 559.208(1) supports the conclusion that the mortgage—once assigned to FNMA—was no longer such a first mortgage of record. The statute does not provide that a first mortgage of record recorded before a condominium-association lien is no longer such a mortgage once it is assigned. Similarly, the statute does not state that such a mortgage does not have priority over a condominium association's lien once the mortgage has been assigned. Under the plain meaning of MCL 559.208(1), the mortgage assigned to FNMA has priority over Coventry's lien.

While the Condominium Act governs the parties' priority dispute, we note that the result reached today is

consistent with the principle that an assignee stands in the place of an assignor, including for purposes of priority rights with respect to the assignment of a mortgage. FNMA stands in the place of Chase, whose mortgage Coventry had notice of and, thus, had priority over Coventry's lien. A record of the assignment of the mortgage from Chase to FNMA "is not necessary to its validity, nor as a protection against the purchaser of the property mortgaged, or any other person than a subsequent purchaser in good faith of the mortgage itself or the note or debt secured by it . . . ." *Wilson*, 110 Mich at 589.

Coventry argues that the assigned mortgage should be subordinate to its condominium-association lien because, while MCL 559.208(1) expressly subordinates condominium-association liens to first mortgages of record, MCL 559.208(1) does not mention assignments or assignees. Coventry insists that the principle of *expressio unius est exclusio alterius* applies in this case. We recognize the "general principle of interpretation that the mention of one thing implies the exclusion of another thing," *Dave's Place, Inc v Liquor Control Comm*, 277 Mich 551, 555; 269 NW 594 (1936) (citation and quotation marks omitted); however, we decline to apply that principle in this case to reach an implicit conclusion that an assigned mortgage is subordinate to a condominium-association lien when the mortgage assigned to FNMA is a first mortgage of record recorded before Coventry's lien under the express, unambiguous plain language of MCL 559.208(1).

Coventry also argues that under MCL 559.211, FNMA is liable to Coventry for all unpaid assessments, interest, late charges, fines, costs, and attorney fees because FNMA is a "purchaser" under MCL 565.34. We do not agree. While Coventry is correct that MCL 565.34 defines "purchaser" as including an assignee of

a mortgage, the definition of "purchaser" in MCL 565.34 does not extend to MCL 559.211 because MCL 565.34 limits the use of the definition to chapter 565 of the Michigan Complied Laws. See MCL 565.34 (prefacing the definition with the following language: "[t]he term 'purchaser,' as used in this chapter"). Moreover, MCL 559.211 does not apply in this case. MCL 559.211 states the following:

> (1) *Upon the sale or conveyance of a condominium unit*, all unpaid assessments, interest, late charges, fines, costs, and attorney fees against a condominium unit shall be paid out of the sale price or by the purchaser in preference over any other assessments or charges of whatever nature except the following:
>
> (a) Amounts due the state, or any subdivision thereof, or any municipality for taxes and special assessments due and unpaid on the condominium unit.
>
> (b) Payments due under a first mortgage having priority thereto.
>
> (2) A purchaser or grantee is entitled to a written statement from the association of co-owners setting forth the amount of unpaid assessments, interest, late charges, fines, costs, and attorney fees against the seller or grantor and the purchaser or grantee is not liable for, nor is the condominium unit conveyed or granted subject to a lien for any unpaid assessments, interest, late charges, fines, costs, and attorney fees against the seller or grantor in excess of the amount set forth in the written statement. Unless the purchaser or grantee requests a written statement from the association of co-owners as provided in this act, at least 5 days before sale, the purchaser or grantee shall be liable for any unpaid assessments against the condominium unit together with interest, costs, fines, late charges, and attorney fees incurred in the collection thereof. [Emphasis added.]

Plainly, MCL 559.211 addresses liability for unpaid assessments, interest, late charges, fines, costs, and

attorney fees "[u]pon the sale or conveyance of a condominium unit[.]" MCL 559.211(1). The present case does not involve the sale or conveyance of a condominium unit; rather, it involves FNMA's obtainment of a security interest in a condominium unit through the assignment of a mortgage. MCL 559.211 does not apply to an assignment of a mortgage of a condominium unit because it deals with the conveyance of a coowner's interest and not a mortgagee's interest.

Accordingly, we conclude that the circuit court erroneously granted summary disposition in favor of Coventry.

Reversed.

O'CONNELL, P.J., and DONOFRIO and BECKERING, JJ., concurred.

CUDDINGTON v UNITED HEALTH SERVICES, INC

Docket No. 303249. Submitted March 15, 2012, at Detroit. Decided October 25, 2012, at 9:10 a.m.

Raymond Cuddington filed an action against United Health Services, Inc., in the Tuscola Circuit Court, seeking damages under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*, for retaliatory discharge. Plaintiff was employed by defendant as a delivery technician and was involved in a car accident while working on the job. Plaintiff declined medical help at the scene of the accident, but developed shoulder and neck pain during the night. Plaintiff's wife contacted defendant the following morning, stating that plaintiff would not be at work because of soreness from the accident. Plaintiff was told to report to work or he would be fired because he did not report his absence before the start of his shift. Plaintiff refused, stating that he wanted to see his doctor, and was informed that he had been terminated from his job when he reported for work two days later. Plaintiff filed a claim for workers' compensation benefits and subsequently commenced this retaliatory-discharge claim under MCL 418.301(13). The court, Patrick Reed Joslyn, J., granted defendant's motion for summary disposition, finding that there was no evidence that plaintiff was fired in retaliation for his workers' compensation claim. Plaintiff appealed.

The Court of Appeals *held*:

1. The primary goal of the WDCA is to promptly deliver benefits to employees injured in the scope of their employment. Filing a petition for workers' compensation benefits is not a prerequisite to all retaliatory-discharge claims. Rather, under MCL 418.301(13), a claim of retaliatory discharge may be established if an employer terminates or otherwise discriminates against an employee in retaliation (1) for filing a complaint under the WDCA, (2) for instituting or causing a proceeding to be instituted under the WDCA, or (3) because the employee exercises a right afforded by the WDCA.

2. An injured employee, under MCL 418.315(1), has the right to seek needed, reasonable medical services and medicines for work-related injuries. The phrase "medical services" encompasses medical consultation, evaluation, and treatment. Determining

whether an employee needed medical services following a workplace injury necessitates a fact-intensive reasonableness inquiry that focuses on the totality of the circumstances surrounding the employee, the workplace, the nature of the injury, and the injury's adverse effect on the employee's overall health and well-being.

3. A prima facie case of retaliation is established under the WDCA if an employee who suffered a work-related injury presents evidence (1) that the employee asserted a right to obtain necessary medical services or actually exercised that right, (2) that the employer knew that the employee engaged in this protected conduct, (3) that the employer took an employment action that was adverse to the employee, and (4) that the adverse employment action and the employee's assertion or exercise of a right afforded under MCL 418.315(1) were causally connected. Direct evidence of retaliation is evidence that if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. When a plaintiff asserting a claim for retaliatory discharge under MCL 418.301(13) establishes a prima facie case of retaliation with circumstantial evidence, the burden of proof shifts to the defendant to articulate a legitimate, nonretaliatory reason for its adverse employment action. If the defendant produces a legitimate, nondiscriminatory reason for its action, the plaintiff must then demonstrate that the evidence in the case, when construed in the plaintiff's favor, is sufficient to permit a reasonable trier of fact to conclude that retaliation was a motivating factor for the adverse action taken toward the plaintiff. A plaintiff can establish that the employer's proffered reasons for the adverse employment action were pretextual by demonstrating that the reasons (1) had no basis in fact, (2) were not the actual factors motivating the decision, or (3) were insufficient to justify the decision.

4. Plaintiff presented prima facie evidence of causation because defendant knew of his work-related injury and that plaintiff exercised a right afforded under the WDCA when he sought medical attention for his injuries rather than reporting for work. Defendant rebutted plaintiff's prima facie proofs with evidence that it had terminated his employment because he called in his absence two minutes after his shift commenced. The trial court erred by holding that summary disposition was appropriate on the basis of plaintiff's failure to prove that he was terminated in retaliation for filing a petition for workers' compensation benefits. Rather, the trial court should have determined if a genuine issue of fact existed regarding whether defendant fired plaintiff because he had exercised the right to seek medical services for his work-related injury, as allowed under MCL 418.315(1).

5. In accordance with *Wilson v Acacia Park Cemetery Ass'n*, 162 Mich App 638, 645-646 (1987), and *Griffey v Prestige Stamping, Inc* 189 Mich App 665, 667-669 (1991), which addressed claims of retaliation for anticipated filings of workers' compensation benefits, a cause of action for retaliatory discharge cannot be based on the anticipated exercise of a right afforded under the WDCA. An employee who brings a claim under MCL 418.301(13) premised on the exercise of a right afforded by the WDCA must demonstrate that he or she first exercised such a right before the employer terminated or otherwise discriminated against the employee in response to that conduct. Plaintiff did not allege that he was terminated in retaliation for an anticipated claim, however, but alleged that his termination was for exercising a right afforded under the WDCA.

Order vacated and case remanded for further proceedings.

1. WORKERS' COMPENSATION — RETALIATORY DISCHARGE — WORKERS' DISABILITY COMPENSATION ACT — EXERCISE OF RIGHT — SEEKING MEDICAL SERVICES.

Filing a petition for workers' compensation benefits is not a prerequisite to all retaliatory-discharge claims; under MCL 418.301(13), a claim of retaliatory discharge may be established if an employer terminates or otherwise discriminates against an employee in retaliation (1) for filing a complaint under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*, (2) for instituting or causing a proceeding to be instituted under the WDCA, or (3) because the employee exercises a right afforded by the WDCA; an injured employee who brings a claim under MCL 418.301(13) premised on the exercise of a right afforded by the WDCA must demonstrate that he or she first exercised such a right before the employer terminated or otherwise discriminated against the employee in response to that conduct; under MCL 418.315(1), an employee has the right to seek needed and reasonable medical services and medicines for work-related injuries; medical services encompasses medical consultation, evaluation, and treatment; determining whether an employee needed medical services following a workplace injury necessitates a fact-intensive reasonableness inquiry that focuses on the totality of the circumstances surrounding the employee, the workplace, the nature of the injury, and the injury's adverse effect on the employee's overall health and well-being.

2. WORKERS' COMPENSATION — RETALIATORY DISCHARGE — SEEKING MEDICAL SERVICES — PRIMA FACIE EVIDENCE — SHIFTING OF THE BURDEN OF PROOF.

A prima facie case of retaliation for the exercise of the right to seek reasonable and necessary services is established under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*, if

an employee who suffered a work-related injury presents evidence (1) that the employee asserted the right or actually exercised that right, (2) that the employer knew that the employee engaged in this protected conduct, (3) that the employer took an employment action that was adverse to the employee, and (4) that the adverse employment action and the employee's assertion or exercise of the right, which is afforded under MCL 418.315(1), were causally connected; direct evidence of retaliation is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions; when a plaintiff asserting a claim for retaliatory discharge under MCL 418.301(13) establishes a prima facie case of retaliation with circumstantial evidence, the burden of proof shifts to the defendant to articulate a legitimate, nonretaliatory reason for its adverse employment action; if the defendant produces a legitimate, nondiscriminatory reason for its action, the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is sufficient to permit a reasonable trier of fact to conclude that retaliation was a motivating factor for the adverse action taken toward the plaintiff; a plaintiff can establish that the employer's proffered reasons for the adverse employment action were pretextual by demonstrating that the reasons (1) had no basis in fact, (2) were not the actual factors motivating the decision, or (3) were insufficient to justify the decision.

Hurlburt, Tsiros, & Allweil, P.C. (by *Mandel I. Allweil*), for Raymond Cuddington.

Stephens & Moore, P.C. (by *Phoebe J. Moore*), for United Health Services, Inc.

Before: BORRELLO, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM. In this wrongful termination action, plaintiff, Raymond Cuddington, appeals as of right the trial court's order granting the motion of defendant, United Health Services, Inc. (UHS), for summary disposition pursuant to MCR 2.116(C)(8) and (10). For the reasons set forth in this opinion, we vacate the trial court's order and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

UHS employed plaintiff for 12 years as a delivery technician. Plaintiff's job duties required him to transport and assemble medical equipment weighing up to 150 pounds. Plaintiff completed his last delivery for defendant on January 7, 2009. On his way back to the UHS office that evening, the van plaintiff was driving slipped on the icy road and collided with another vehicle. Plaintiff called Robert Daniels, president of UHS, and reported the incident. Robert and his wife, Rebecca Daniels, also an officer of the company, arrived at the accident scene and found plaintiff sitting in an ambulance. Plaintiff had "a fat lip and a bruised cheek from hitting the mirror" but elected not to go to the hospital. During the night, however, he developed pain in his shoulder and neck area.

The next morning, plaintiff experienced difficulty getting out of bed and sought medical attention. Plaintiff testified at an unemployment compensation hearing that his wife called UHS at 9:00 a.m. and informed a secretary that he was unable to work because of soreness from the accident. According to plaintiff, Robert called a few minutes later and asked plaintiff why he was not at work. Plaintiff informed Robert that he "was very sore from the accident." Robert advised plaintiff that he needed to see a doctor. Rebecca took the phone and, as recounted by plaintiff, expressed the following: "[Y]ou ain't hurt, if you were hurt you would have went in the ambulance to the hospital last night. If you don't come into work, you are blanking- -blanking fired." Robert described the same conversation as follows: "My wife got on the phone and basically told him to get his butt to work or he was not going to be employed, because he didn't call in before his shift." Plaintiff declined to come in, insisting that he was very sore and wanted to see his doctor.

That same morning, plaintiff went to the office of Richard Hall, D.O., his personal physician. While a nurse was taking plaintiff's blood pressure, another nurse announced that Dr. Hall had been called to Saginaw for an emergency. Plaintiff requested that Dr. Hall's office contact UHS to verify the visit. Although he had not yet been examined by Dr. Hall, plaintiff reported for work on January 9, 2009. Robert informed him that he was "done" and needed to leave his keys and gas card at the office.[1]

Robert and Rebecca disputed plaintiff's version of events. Robert averred that plaintiff failed to call in before his shift and that plaintiff was terminated after admitting that he did not have a "doctor's slip in accordance with the Employee Manual." Rebecca claimed that she had terminated plaintiff because he did not show up for work, had not called, and "was insubordinate in regards to reporting to work."

Plaintiff filed a claim for workers' compensation benefits and subsequently commenced this action for retaliatory discharge pursuant to MCL 418.301(13),[2] a provision of the Worker's Disability Compensation Act ("WDCA" or the "Act"), MCL 418.101 *et seq*. Plaintiff alleged that he had exercised a right protected under

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[1] Dr. Hall examined plaintiff on January 12, 2009, diagnosed a "cervical sprain," and noted that "since he is driving and has to lift heavy equipment I am going to keep him off for a while."

[2] Plaintiff filed his complaint pursuant to MCL 418.301(11); subsequently, the Legislature amended MCL 418.301 and reclassified subsection (11) as subsection (13). See 2011 PA 266. MCL 418.301(13) now provides:

> A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.

the Act by seeking medical treatment for a work-related injury and that defendant violated the Act when it terminated him in retaliation for exercising that right.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that plaintiff could not establish a viable cause of action under the WDCA because he did not petition for workers' compensation benefits until *after* he was terminated. Defendant argued that plaintiff could not sustain a WDCA claim based merely on an intent to claim workers' compensation benefits.

The trial court granted defendant's motion, finding "no indication here that Plaintiff was fired in retaliation for his worker's compensation claim. Plaintiff did not even file his claim until after he had been terminated."

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition to determine whether the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The trial court did not indicate whether it granted defendant's motion pursuant to MCR 2.116(C)(8) or (10); however, because the trial court considered documentary evidence beyond the pleadings, we construe the motion as having been granted pursuant to MCR 2.116(C)(10). *Krass v Tri-Co Security, Inc*, 233 Mich App 661, 664-665; 593 NW2d 578 (1999). In reviewing a motion brought under MCR 2.116(C)(10), we review the evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether there is a genuine issue regarding any material fact. *Maiden*, 461 Mich at 120. "A genuine issue of material fact exists when the record leaves open

an issue on which reasonable minds could differ." *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006).

This case requires that we construe the applicable provisions of the WDCA. Issues of statutory construction involve questions of law that we review de novo. *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011). "The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Id*. at 296. "[U]nless explicitly defined in a statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Yudashkin v Holden*, 247 Mich App 642, 650; 637 NW2d 257 (2001) (quotation marks and citation omitted).

III. ANALYSIS

Plaintiff contends that by alleging that defendant terminated his employment because he exercised a right afforded him under the WDCA—the right to seek medical services for a work-related injury—he pleaded a cognizable retaliation claim under MCL 418.301(13). The evidence supports that plaintiff was terminated after suffering a work-related injury and expressing a need for medical services. We hold that pursuant to the WDCA, plaintiff had a right to seek medical consultation concerning his employment-related injury. Because MCL 418.301(13) contemplates that an employee may pursue a retaliation claim arising from the exercise of this right, the trial court improperly granted summary disposition to defendant. Whether retaliation actually played a role in defendant's decision to terminate plaintiff's employment presents a factual question subject to further development on remand, in accordance with this opinion.

A. RETALIATORY DISCHARGE UNDER THE WDCA

The primary goal of the WDCA is to "promptly deliver benefits to employees injured in the scope of their employment." *Dunbar v Mental Health Dep't*, 197 Mich App 1, 6; 495 NW2d 152 (1992). Initially, the Act did not contain a retaliatory-discharge cause of action. *Wilson v Acacia Park Cemetery Ass'n*, 162 Mich App 638, 645; 413 NW2d 79 (1987). In 1981 PA 200, the Legislature codified a cause of action for retaliatory discharge by amending the WDCA and adding MCL 418.301(11), which was later reclassified as MCL 418.301(13). *Wilson*, 162 Mich App at 645; 2011 PA 266. MCL 418.301(13) now provides:

> A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act *or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.* [Emphasis added].

The plain language of MCL 418.301(13) establishes that a petition for workers' compensation benefits is not a condition precedent to *all* retaliatory-discharge claims. Rather, the statute creates a cause of action when an employer terminates or otherwise discriminates against an employee in retaliation (1) for filing a complaint under the WDCA, (2) for instituting or causing a proceeding to be instituted under the WDCA, or (3) "because of the exercise by the employee . . . of a right afforded by this act." By including within the prohibitions set forth in MCL 418.301(13) that an employer may not retaliate against an employee who has exercised a protected right, the Legislature recognized that an employer could circumvent the goals of the WDCA by firing an injured employee before the employee had any opportunity to formally initiate

workers' compensation proceedings. Had the statute failed to include the final alternative clause, the result would be "a foot race, with the winner being determined by the event to first occur – either the firing of the employee or the filing of a claim with the Workers' Compensation Board." *Bullard v Alcan Aluminum Corp*, 113 Fed Appx 684, 690 (CA 6, 2004) (quotation marks and citation omitted).

B. MEDICAL SERVICES AS A RIGHT UNDER THE WDCA

Having determined that an employee may have a cause of action based on the exercise of a right, we now turn to whether the Act affords employees a right to seek medical services for work-related injuries.

The WDCA does not expressly define the term "right" for purposes of the Act, and this Court has not previously defined the term in this context. In another context, this Court has defined the word to mean " '[s]omething that is due to a person . . . [a] power, privilege, or immunity secured to a person by law.' " *Risko v Grand Haven Charter Twp Zoning Bd of Appeals*, 284 Mich App 453, 460; 773 NW2d 730 (2009), quoting Black's Law Dictionary (8th ed). A review of MCL 418.315(1) reveals that the WDCA affords injured employees the right to seek reasonable medical services and medicines for work-related injuries. Specifically, MCL 418.315(1) provides in relevant part:

> The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, *reasonable medical, surgical, and hospital services and medicines*, or other attendance or treatment recognized by the laws of this state as legal, *when they are needed*. [Emphasis added.]

Our Supreme Court has not specifically defined the term "medical . . . services." However, the ordinary,

commonly understood meaning of this term encompasses medical consultation, evaluation, and treatment.

The primary purpose of the WDCA as a whole is to "promptly deliver benefits to employees injured in the scope of their employment." *Dunbar*, 197 Mich App at 6; see *Klooster*, 488 Mich at 296 (noting that when interpreting words in a statute, we must give effect to the intent of the Legislature). Given that the Act requires employers to furnish medical services to an employee injured during the course of his or her employment and that the purpose of the Act is to ensure that injured workers receive benefits for such injuries, it necessarily follows that the Act affords an injured employee a right to seek reasonable, needed medical services for injuries that arise in the course of employment.

While employees have the right to seek medical services for work-related injuries, we readily acknowledge that not all injuries may actually require treatment. Rather, whether an employee "needed" medical services following a workplace injury necessarily requires a fact-intensive reasonableness inquiry focusing on the totality of the circumstances surrounding the employee, the workplace, the nature of the injury, and the injury's adverse effect on the employee's overall health and well-being. No single factor is dispositive, and a reasonableness inquiry may encompass any evidence bearing on whether medical services were necessary. This inquiry may include whether the injury involved a significant event—such as in this case, an automobile accident and whether the injury caused pain or diminished the employee's ability to perform his or her job responsibilities. Medical records may bear on whether medical services were reasonably necessary following the injury. As discussed in more detail below,

the employee bears the burden of proving that he or she needed medical services following a workplace injury.

C. APPLICATION OF MCL 418.301(13) TO THE PRESENT CASE

Having found that the WDCA affords an injured employee the right to seek reasonable and necessary medical services, we consider the contours of an action for retaliatory discharge arising from the exercise of that right.

In *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239, 248-249; 531 NW2d 144 (1995), our Supreme Court held that an action for wrongful discharge for filing a workers' compensation action sounds in tort. Accordingly, we draw upon the structure of other statutorily created retaliation torts, including claims brought under the Whistleblowers' Protection Act, MCL 15.361 *et seq.*, and the Civil Rights Act (CRA), MCL 37.2101 *et seq.* To establish a prima facie case of retaliation under the WDCA, an employee who has suffered a work-related injury must present evidence: (1) that the employee asserted a right to obtain necessary medical services or actually exercised that right, (2) that the employer knew that the employee engaged in this protected conduct, (3) that the employer took an employment action adverse to the employee, and (4) that the adverse employment action and the employee's assertion or exercise of a right afforded under MCL 418.315(1) were causally connected. See *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997) (noting the elements of a prima facie case of unlawful retaliation that the plaintiff must prove to establish a violation of the CRA).

The last element, causation, is usually difficult to prove. Under some circumstances, a plaintiff may be

able to produce direct evidence of retaliatory animus. In employment discrimination cases, our Supreme Court has defined "direct evidence" as "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001) (quotation marks and citation omitted). In the retaliation context, direct evidence of retaliation establishes without resort to an inference that an employer's decision to take an adverse employment action was at least in part retaliatory.

Rarely will an employer openly admit having fired a worker in retaliation for exercising a right of employment. Rebecca's alleged threat to fire plaintiff if he did not report for work does not constitute direct evidence that she fired him because he intended to seek medical services, but it supports an inference to that effect. When a plaintiff presents circumstantial rather than direct evidence of an employer's retaliatory motive, we examine the claim under the *McDonnell Douglas*/*Burdine*[3] burden-shifting framework. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 470; 606 NW2d 398 (1999).[4]

Under the *McDonnell Douglas*/*Burdine* analysis, when a plaintiff asserting a claim for retaliatory discharge under MCL 418.301(13) circumstantially establishes a rebuttable prima facie case of retaliation, the burden shifts to the defendant to articulate a legitimate, nonretaliatory reason for its adverse employment

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[3] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973); *Texas Dep't of Community Affairs v Burdine*, 450 US 248; 101 S Ct 1089; 67 L Ed2d 207 (1981).

[4] The burden-shifting approach does not apply if a plaintiff cites direct evidence of unlawful retaliation. See *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539-540; 620 NW2d 836 (2001) (applying the burden-shifting approach in the context of a race discrimination claim brought under the CRA).

action. See *Hazle*, 464 Mich at 464. If the defendant produces a legitimate, nondiscriminatory reason for its action, "the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is 'sufficient to permit a reasonable trier of fact to conclude that [retaliation] was a motivating factor for the adverse action taken by the employer toward the plaintiff.' " *Id*. at 465, quoting *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 906 (1998). A plaintiff can establish that the employer's proffered reasons for the adverse employment action qualify as pretextual by demonstrating that the reasons (1) had no basis in fact, (2) were not the actual factors motivating the decision, or (3) were insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990).

The record evidence in this case supports that defendant knew of plaintiff's work-related injury and that plaintiff exercised a right afforded under the Act. Rebecca's instruction that plaintiff report for work despite his injury and professed need for medical services supports an inference of causation, i.e., that defendant terminated plaintiff's employment because he elected to obtain necessary medical services instead of reporting for work. Thus, viewed in the light most favorable to plaintiff, plaintiff's evidence sufficed to establish a prima facie retaliation claim.

Defendant rebutted plaintiff's prima facie proofs with evidence that it had terminated plaintiff's employment because he called in at 9:02 a.m. rather than before 9:00 a.m., when his shift commenced.[5] In response to this legitimate reason for termination, plain-

[5] At an unemployment compensation hearing, Robert agreed with the referee that if plaintiff "had called in prior to his shift, he would still be employed."

tiff asserted that his wife had called defendant in a timely fashion and left a message that plaintiff was unable to work because of his injury. Whether defendant fired plaintiff as retaliation for his pursuit of medical services is central to this case. However, summary disposition was granted before the parties had an opportunity to adequately explore the issue of causation. Further factual development concerning this issue is required consistent with this opinion.

D. *GRIFFEY v PRESTIGE STAMPING, INC* AND *WILSON v ACACIA PARK CEMETERY ASSOCIATION* ARE CONSISTENT WITH OUR HOLDING

Defendant contends that binding precedent precludes a retaliatory-discharge claim "premised on the employer's anticipation of a future claim [for benefits]," citing *Wilson*, 162 Mich App at 638, and *Griffey v Prestige Stamping, Inc*, 189 Mich App 665; 473 NW2d 790 (1991).

In *Wilson*, the plaintiff was injured during the course of his duties as a volunteer firefighter and was unable to return to his employment with the defendant. *Wilson*, 162 Mich App at 640. While the plaintiff recovered from his injury, the defendant terminated his employment. *Id*. The plaintiff filed suit and alleged, in part, that the defendant had terminated his employment in retaliation for "anticipated future workers' compensation claims." *Id*. at 641. This Court affirmed the trial court's order granting summary disposition for the defendant on grounds that the plaintiff's retaliatory-discharge claim was premised on the defendant's anticipation of future claims for workers' compensation benefits. *Id*. at 645-646. This Court explained: "The statutory provision prohibiting retaliatory discharge in [MCL 418.301(13)] does not help plaintiff because it prohibits discharge or discrimination only in retaliation for *prior*

claims for workers' compensation benefits. Here plaintiff premises his right of recovery on defendant's anticipation of *future* claims." *Id*. at 645. The *Wilson* Court concluded that "retaliatory discharge premised upon the employer's *anticipation of a future claim* does not state a legally cognizable cause of action" under MCL 418.301(13). *Id*. at 646 (emphasis added).

In *Griffey*, the defendant terminated the plaintiff's employment and the plaintiff brought suit, alleging, in part, that the defendant had terminated him in order to avoid paying workers' compensation benefits. *Griffey*, 189 Mich App at 666. However, the plaintiff did not file a petition for workers' compensation benefits until after he filed his complaint. *Id*. On appeal, the defendant argued that the plaintiff had failed to state a viable claim for retaliatory discharge because his complaint was premised on an anticipated petition for workers' compensation benefits. *Id*. at 666-667. This Court agreed and held that the plaintiff's claim failed under *Wilson*, 162 Mich App at 638. *Id*. at 667-669.

In this matter, distinct from the factual and legal issues presented to this Court in *Wilson* and *Griffey*, plaintiff did not allege that defendant terminated him in retaliation for his anticipated filing of a petition for workers' compensation benefits. Rather, unlike the plaintiffs in *Wilson* and *Griffey*, plaintiff alleged that defendant terminated him in retaliation for exercising a right afforded under the WDCA (i.e., the right to seek medical services for a work-related injury). *Wilson* and *Griffey* did not address whether an employee has a cause of action for retaliatory discharge under MCL 418.301(13) based on retaliation for exercising a right under the WDCA. Additionally, before his discharge, plaintiff informed defendant that he was invoking his right under the WDCA to seek needed medical services

for a work-related injury. Thus, *Wilson* and *Griffey* are both factually and legally dissimilar to the instant case.

However, we concur with the principal conclusion of *Wilson* and *Griffey* and similarly hold that a cause of action for retaliatory discharge cannot be based on the *anticipated* exercise of a right afforded under the Act. Like the plaintiffs in those cases who needed to show that they had filed a claim for workers' compensation benefits before they were terminated, an employee who brings a claim under MCL 418.301(13) premised on the exercise of a right afforded by the Act must show that he or she first exercised such a right (i.e., in this case sought medical services) before the employer terminated or otherwise discriminated against the employee in response to that conduct. Our decision in this case is therefore in accord with our prior holdings in *Wilson* and *Griffey* to the extent that we conclude that a cause of action for retaliatory discharge cannot be based on the *anticipated* exercise of a right afforded under the Act. See *Wilson*, 162 Mich App at 646; *Griffey*, 189 Mich App at 667-669.

IV. CONCLUSION

In sum, we hold that filing a petition for workers' compensation benefits is not a prerequisite to all retaliatory-discharge claims under MCL 418.301(13). Rather, an employee who exercises a right afforded under the Act and is subsequently terminated or discriminated against in retaliation may maintain an action. Furthermore, the Act affords an employee the right to seek medical services when needed for work-related injuries. In this case, the trial court erred by holding that summary disposition was appropriate on the basis of plaintiff's failure to prove that he was terminated in retaliation for filing a petition for work-

ers' compensation benefits. Rather, the trial court should have determined if there existed a genuine issue of fact regarding whether defendant fired plaintiff because he exercised a right afforded him under MCL 418.315(1).

Trial court's order vacated and case remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, having prevailed, may tax costs pursuant to MCR 7.219(A).

BORRELLO, P.J., and BECKERING and GLEICHER, JJ., concurred.

HARDAWAY v WAYNE COUNTY

Docket No. 300079. Submitted January 11, 2012, at Detroit. Decided October 30, 2012, at 9:00 a.m. Reversed, 494 Mich ___.

Hurticene Hardaway brought an action in the Wayne Circuit Court seeking lifetime retirement benefits pursuant to Wayne County Commission Resolution No. 94-903, which granted extended benefits to certain classes of former employees. Plaintiff had been appointed and served as a principal attorney in defendant's office of corporation counsel, a position that was not subject to confirmation by the Wayne County Commission. The court, Michael F. Sapala, J., granted summary disposition to defendant on the ground that plaintiff was not entitled to receive extended benefits under the resolution because her appointment had not been confirmed by the commission. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court erred by granting defendant summary disposition. Resolution No. 94-903 provided that a person who was separated from county employment after January 1, 1994, with at least eight years of service and who had served as "an appointee other than a member of a board or commission who is confirmed by the County Commission pursuant to Section 3.115(4) of the Wayne County Charter" was entitled to the same insurance and healthcare benefits as a retiree from the county's defined benefit plan. This provision is ambiguous because it could be read either to provide benefits to an appointee who was confirmed by the county commission but was not a member of a board or commission or to provide benefits to any appointee, whether confirmed or not, as long as that appointee was not confirmed by the commission to membership of a board or commission. Under the last-antecedent rule of statutory construction, a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent unless something in the statute requires a different interpretation. Accordingly, the modifying phrase "who is confirmed by the County Commission pursuant to Section 3.115(4) of the Wayne County Charter" applied to the immediately preceding clause. Therefore, because plaintiff was an appointee and had not been confirmed by the commission to

membership of a board or commission and met the other conditions for receiving benefits under this provision, she was entitled to summary disposition in her favor.

2. Defendant was entitled to summary disposition of plaintiff's claim for breach of contract. Under Michigan law, there is a strong presumption that statutes do not create contractual rights. Because Resolution No. 94-903 contains no language indicating that the county commission intended to form a contract, plaintiff failed to overcome the strong presumption that this provision did not create contractual rights.

3. Defendant was entitled to summary disposition of plaintiff's claim for promissory estoppel. Promissory estoppel requires (1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and (3) that, in fact, produced reliance or forbearance of that nature (4) in circumstances requiring enforcement of the promise if injustice is to be avoided. Plaintiff claimed that her continued employment after the promise was made was sufficient to constitute the detrimental reliance to support her claim; however, the mere continuing of a prior employer-employee relationship does not support a claim of promissory estoppel.

Reversed and remanded.

Hurticene Hardaway *in propria persona*.

Bruce A. Campbell, Assistant Corporation Counsel, for Wayne County.

Before: JANSEN, P.J., and WILDER and K. F. KELLY, JJ.

WILDER, J. Plaintiff, Hurticene Hardaway, appeals as of right an order granting summary disposition in favor of defendant, Wayne County. Plaintiff was seeking certain lifetime retirement benefits. We reverse and remand.

In March 1990, plaintiff was appointed to work as a principal attorney in the Office of Corporation Counsel for defendant.[1] Plaintiff's employment ended more than 13 years later in 2003. On December 15, 1994, the Wayne

[1] Notably, plaintiff's appointment was not subject to confirmation by the Wayne County Commission.

County Commission adopted Resolution No. 94-903, which amended Resolution No. 93-742 to provide in pertinent part:

> 2. If a person is separated from the County after January 1, 1994, with at least a total of eight years of County service, and has served as an elected Executive Officer, the Deputy Executive Officer, or an Assistant Executive Officer of the County, or as a County Commissioner, or as an appointed department head or deputy department head, or an appointee other than a member of a board or commission who is confirmed by the County Commission pursuant to Section 3.115(4) of the Wayne County Charter, or as an appointed Chief of Staff for an elected official or legislative body pursuant to an organizational plan, or the appointed head of one of the support divisions of the County Commission, that person shall be entitled to the same insurance and health care benefits for himself or herself, his or her spouse and dependents, as a retiree from the Defined Benefit Plan 1.

Section 3.115(4) of the Wayne County Charter provides that the county commission may "[a]pprove or reject appointments by the [chief executive officer (CEO)] of [sic] the Deputy CEO, department heads, their deputy directors, and members of boards and commissions in accordance with Article IV." And article IV of the charter deals with the executive branch of the county government. Section 4.385(1) of article IV authorizes the CEO to appoint, with the approval of the majority of the county commission, the following: "[t]he Deputy CEO, directors, deputy directors, members of boards and commissions, representatives of the County on intergovernmental bodies, and all other officials or representatives not in the classified service[.]"

After plaintiff left her employment with the county, on three occasions she submitted requests to the director of personnel and human resources for the extended

benefits described above. The director denied the first two requests and did not respond to the last one.

On May 1, 2009, plaintiff, seeking the extended retirement benefits, filed a complaint for declaratory judgment, breach of contract, and promissory estoppel. Defendant filed an answer on May 28, 2009, denying that plaintiff was entitled to the benefits. On July 9, 2010, plaintiff moved for summary disposition.[2] After conducting a hearing on the motion, the circuit court denied plaintiff's motion and instead awarded summary disposition in favor of defendant.[3] The circuit court concluded:

> Plaintiff is not included in the class of persons eligible to receive additional benefits. It is not disputed that Plaintiff was appointed to her position as a Principal Attorney, but was not a department head, director or executive officer. Moreover, Plaintiff does not dispute that her appointment was not confirmed [by] the County Commission. Accordingly, she is excluded from receiving additional benefits.
>
> * * *
>
> The clear language of the resolution states that it applies to an appointee who is confirmed by the County Commission. The court respectfully disagrees with Plaintiff's interpretation and finds that the resolution is unambiguous and does not include appointees who were not confirmed by the Commission. Based on the language of the resolution, Plaintiff is not entitled to receive extended benefits.

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[2] For reasons unknown, plaintiff's motion for summary disposition and defendant's response are missing from the lower court record.

[3] The trial court did not cite any authority for granting summary disposition in favor of defendant but apparently relied on MCR 2.116(I)(2), which allows a court to "render judgment in favor of the opposing party" if it appears that the opposing party is entitled to judgment.

I. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Woodman v Kera LLC*, 486 Mich 228, 236; 785 NW2d 1 (2010). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001). This issue also involves the interpretation of a county resolution, which, as with the interpretation of a statute, is a question of law that is reviewed de novo. *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 140; 719 NW2d 553 (2006).

The primary goal of judicial interpretation is to ascertain and give effect to the intent of the legislative body that created the language. *Kessler v Kessler*, 295 Mich App 54, 60; 811 NW2d 39 (2011). The first factor in determining legislative intent is the specific language of the legislation. *Capitol Props Group, LLC v 1247 Center Street, LLC*, 283 Mich App 422, 434; 770 NW2d 105 (2009). "The language of a statute must be accorded its plain and ordinary meaning." *Kessler*, 295 Mich App at 59-60. "When a statute's language is clear and unambiguous, judicial construction or interpretation is not necessary or permissible . . . ." *PIC Maintenance, Inc v Dep't of Treasury*, 293 Mich App 403, 408; 809 NW2d 669 (2011). But when a statute is ambiguous, judicial construction is permitted. *Id*. at 409. A statute is ambiguous when it irreconcilably conflicts with another provision or is equally susceptible to more than a single meaning. *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004). Furthermore, any construction that would render any part of the resolution surplusage or nugatory should be avoided. See *Duffy*

v Dep't of Natural Resources, 490 Mich 198, 215; 805 NW2d 399 (2011) (giving this standard in the context of construing statutes).

II. ANALYSIS

Plaintiff argues that the trial court erred when it denied her motion for summary disposition and granted summary disposition in favor of defendant. Specifically, plaintiff contends that she is eligible, under the language of Resolution No. 94-903, for the listed extended benefits. We agree.

An employee must meet three conditions in order to qualify for insurance and health care benefits under Resolution No. 94-903:

> (1) The employee must have separated from employment with the county after January 1, 1994.
>
> (2) The employee must have had at least a total of eight years of county service.
>
> (3) The employee must have served as one of the following:
>
> (a) An elected executive officer.
>
> (b) The deputy executive officer.
>
> (c) An assistant executive officer of the county.
>
> (d) A county commissioner.
>
> (e) An appointed department head or deputy department head.
>
> (f) An appointee other than a member of a board or commission who is confirmed by the county commission pursuant to section 3.115(4) of the Wayne County Charter.
>
> (g) An appointed Chief of Staff for an elected official or legislative body pursuant to an organizational plan.
>
> (h) The appointed head of one of the support divisions of the county commission.

The parties do not dispute that plaintiff meets the first two requirements. However, defendant claims that plaintiff does not satisfy any of the conditions for the third requirement, while plaintiff maintains that she was "an appointee other than a member of a board or commission who is confirmed by the County Commission pursuant to Section 3.115(4) of the Wayne County Charter" and that she therefore is entitled to the benefits she seeks. As drafted, the phrase "an appointee other than a member of a board or commission who is confirmed by the County Commission pursuant to Section 3.115(4) of the Wayne County Charter" is equally susceptible to more than one meaning. The phrase could be read to provide benefits to an appointee who was confirmed by the county commission but was not a member of a board or commission, or the phrase could be read to provide benefits to *any* appointee, whether confirmed or not, as long as that appointee was not confirmed by the commission to membership of a board or commission. Given this ambiguity, judicial construction is required to determine from the plain meaning of the text the intent of the Wayne County Commission in adopting this resolution.

"The 'last antecedent' rule of statutory construction provides that a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation." *Stanton v Battle Creek*, 466 Mich 611, 616; 647 NW2d 508 (2002). The modifying and restrictive phrase at issue in the instant resolution is the language "who is confirmed by the County Commission pursuant to Section 3.115(4) of the Wayne County Charter." Applying this restrictive phrase to the immediately preceding clause, or last antecedent, we conclude that benefits are

available to appointees as long as they were not confirmed by the county commission to membership of a board or commission.

Because plaintiff was an appointee and was not confirmed by the Wayne County Commission as a member of a board or commission, she is eligible for the benefits she claims. We reject defendant's interpretation that only appointees confirmed by the county commissioners are eligible for benefits because it is inconsistent with the rules of construction applicable to modifying and restricting phrases and, further, because defendant has not shown that anything else in the resolution requires a different interpretation. Although one may question the wisdom of the application of the county's policy in this fashion, courts are tasked only with "the important, but yet limited, duty to read into and interpret what the Legislature has actually made the law." *Lansing Mayor*, 470 Mich at 161. Thus, our sole responsibility is to enforce the resolution as written. See *Shelby Charter Twp v Papesh*, 267 Mich App 92, 107; 704 NW2d 92 (2005). Therefore, the trial court erred when it granted summary disposition in favor of defendant on plaintiff's declaratory judgment claim. Instead, plaintiff was entitled to summary disposition on this claim.

Even though plaintiff does not present any arguments related to her other two claims, breach of contract and promissory estoppel, we briefly will discuss them. We conclude that summary disposition in defendant's favor is appropriate for these two counts.

Plaintiff's breach of contract claim must fail because she failed to show that she has a contract for the asserted benefits. In Michigan, there is a "strong presumption that statutes do not create contractual rights." *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 661; 698 NW2d 350 (2005). Accord-

ingly, "[i]n order for a statute to form the basis of a contract, the statutory language must be plain and susceptible of no other reasonable construction than that the Legislature intended to be bound to a contract." *Id.* at 662 (citations and quotation marks omitted). Resolution No. 94-903 does not contain any language indicating the county commission's intent to form a contract. Thus, plaintiff has failed to overcome the strong presumption against the creation of any contractual rights, and defendant is entitled to summary disposition on this claim.

Likewise, plaintiff's promissory estoppel claim must fail also. Promissory estoppel requires

> (1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and (3) that, in fact, produced reliance or forbearance of that nature (4) in circumstances requiring enforcement of the promise if injustice is to be avoided. [*Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008).]

Without addressing whether the resolution constitutes a definite and clear promise, we conclude that plaintiff cannot meet the remaining elements. Plaintiff's complaint states that "[i]n reliance on the promise, and to her substantial detriment, Plaintiff performed all that was expected in managing Defendant's business." In other words, plaintiff is claiming that her continued employment after the "promise" was made is sufficient to constitute the detrimental reliance to support her claim. But the mere continuing of that prior employer-employee relationship "cannot support a claim of promissory estoppel." *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 443; 505 NW2d 275 (1993). Thus, defendant is entitled to summary disposition on plaintiff's promissory estoppel claim.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, the prevailing party, may tax costs pursuant to MCR 7.219.

JANSEN, P.J., and K. F. KELLY, J., concurred with WILDER, J.

FRADCO, INC v DEPARTMENT OF TREASURY

Docket No. 306617. Submitted October 2, 2012, at Lansing. Decided October 30, 2012, at 9:05 a.m. Amended, 298 Mich App 801. Leave to appeal granted, 493 Mich 948.

Fradco, Inc., filed an appeal on July 28, 2010, in the Tax Tribunal, contesting a final assessment issued by the Department of Treasury that required Fradco to pay unpaid sales taxes, penalties, and interest. Despite Fradco's prior request, in accordance with MCL 205.8, that the department send copies of all letters and notices to Fradco's designated representative, the final assessment had initially been sent only to Fradco around September 16, 2009. Although the department had also sent a letter dated April 21, 2010, to a Fradco representative that indicated that a final assessment had been issued on September 17, 2009, Fradco's designated representative did not receive a copy of the actual final assessment until July 20, 2010. The department sought summary disposition under MCR 2.116(C)(4), arguing that the tribunal did not have jurisdiction over the appeal because it had not been filed within 35 days of the final assessment as required by MCL 205.22(1). The tribunal denied the motion for summary disposition, concluding that MCL 205.8 adds a parallel notice requirement whenever a taxpayer has filed a proper request that copies of letters and notices be sent to a designated representative and, therefore, the 35-day period had not begun to run until Fradco's designated representative received a copy of the final assessment. The tribunal eventually issued an order canceling the final assessment. The department appealed, contending that the tribunal lacked jurisdiction to hear Fradco's appeal.

The Court of Appeals *held*:

The Tax Tribunal properly held that it had jurisdiction to hear Fradco's appeal.

1. The tribunal correctly held that MCL 205.8 was applicable and binding on the department and that MCL 205.28(1) must be interpreted in parallel with MCL 205.8. These sections impose parallel notice requirements whenever a taxpayer has a valid written request on file for the department to send copies of letters and notices to a designated representative. In such a situation, the

35-day period of MCL 205.22(1) does not begin to run until notice has been given under both MCL 205.8 and MCL 205.28(1) to the taxpayer and the taxpayer's designated representative.

2. The department, when imposing taxes under the General Sales Tax Act, MCL 205.51 *et seq*., is required by § 9(1) of the act, MCL 205.59(1), to follow the provisions of the revenue collection act, MCL 205.1 *et seq*., unless the provisions of the revenue collection act and the General Sales Tax Act conflict, in which event the provisions of the General Sales Tax Act apply. Because the notice statutes at issue in this case, MCL 205.8, 205.22(1), and 205.28, are part of the revenue collection act and the General Sales Tax Act does not have its own notice requirements, MCL 205.59(1) required the department to follow all those statutes.

3. A final assessment by the department is a "notice" for purposes of interpreting MCL 205.8.

4. The letter dated April 21, 2010, that the department sent to one of Fradco's representatives only gave the representative notice of the issuance of the final assessment and did not include a copy of the final assessment and, therefore, was not sufficient to satisfy the requirements of MCL 205.8 to send "a copy of" the notice. The notice of the issuance of the assessment without a copy of the assessment was not itself the "notice" required by the statute.

Affirmed.

1. TAXATION — APPEAL — LIMITATION OF ACTIONS — ASSESSMENTS — DECISIONS — ORDERS — DEPARTMENT OF TREASURY — TAX TRIBUNAL — COURT OF CLAIMS.

A taxpayer may appeal the contested portion of an assessment, decision, or order of the Department of Treasury in the Tax Tribunal within 35 days, or in the Court of Claims within 90 days, after the assessment, decision, or order; if an appeal is not filed within the relevant period, the assessment, decision, or order is final and not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack (MCL 205.22[1] and [4]).

2. TAXATION — CONFLICT OF LAWS — GENERAL SALES TAX ACT — REVENUE COLLECTION ACT.

The Department of Treasury must follow the provisions of the revenue collection act, MCL 205.1 *et seq*., when imposing taxes under the General Sales Tax Act, MCL 205.51 *et seq*., unless the provisions of the revenue collection act and the General Sales Tax Act conflict, in which event the provisions of the General Sales Tax Act apply (MCL 205.59[1]).

3. TAXATION — LIMITATION OF ACTIONS — NOTICES AND LETTERS REGARDING DISPUTES — REPRESENTATIVES DESIGNATED BY TAXPAYERS — PARALLEL NOTICE REQUIREMENTS.

The provisions of MCL 205.8 and MCL 205.28(1) of the revenue collection act impose parallel notice requirements whenever a taxpayer has a valid written request filed with the Department of Treasury requesting that copies of letters and notices regarding a dispute with the taxpayer be sent to a representative designated by the taxpayer; if a taxpayer has filed a proper request, the department must give notice to both the taxpayer and the taxpayer's designated representative before the 35-day period within which the taxpayer may appeal the contested portion of an assessment, decision, or order of the department in the Tax Tribunal begins to run (MCL 205.22[1]).

4. TAXATION — FINAL ASSESSMENTS — WORDS AND PHRASES — NOTICE.

A final assessment by the Department of Treasury is a "notice" for purposes of the statute that requires the department to send copies of letters and notices regarding a dispute with a taxpayer to the official representative of the taxpayer whenever the taxpayer has filed with the department a valid written request for such notice; a letter that gives a representative notice that a final assessment has been issued but does not include a copy of the final assessment does not satisfy the requirement that a copy of the notice be sent to the representative (MCL 205.8).

The Novis Law Firm, PLLC (by *James H. Novis*), for Fradco, Inc.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Scott L. Damich* and *Amy M. Patterson*, Assistant Attorneys General, for the Department of Treasury.

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

PER CURIAM. Respondent appeals as of right the Tax Tribunal's order canceling an assessment against petitioner. This appeal is being considered concurrently

with *SMK, LLC v Dep't of Treasury*, 298 Mich App 302; 826 NW2d 186 (2012), in which the same issue is presented for our consideration. The sole issue before us is whether the Tax Tribunal had the jurisdiction to hear petitioner's appeal of its tax assessment. We conclude that it did and affirm.

This Court's review of a Tax Tribunal decision not relating to property tax valuation or allocation must include, at a minimum, whether the decision was authorized by law and, in cases in which a hearing was required, whether the decision was supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28. When the resolution of the matter involves statutory interpretation, review de novo is appropriate. *AERC of Mich, LLC v Grand Rapids*, 266 Mich App 717, 722; 702 NW2d 692 (2005). "The purpose of statutory interpretation is to discover and give effect to the Legislature's intentions, and unambiguous statutory language should be enforced as written." *Walgreen Co v Macomb Twp*, 280 Mich App 58, 62; 760 NW2d 594 (2008). "In interpreting a statute, this Court avoids a construction that would render any part of the statute surplusage or nugatory [and] the statute must be read as a whole [with] [i]ndividual words and phrases [being] read in the context of the entire legislative scheme." *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012) (citations omitted).

In the instant case, an audit revealed that petitioner had understated its taxable sales. On the basis of the result of this audit, respondent confirmed that petitioner had understated its taxable sales and issued a final assessment against petitioner requiring it to pay unpaid sales taxes, penalties, and interest. Despite petitioner's request for respondent to send copies of all

letters and notices to petitioner's representative, the final assessment was initially sent only to petitioner, on or about September 16, 2009. Petitioner's representative did not receive the final assessment from respondent until July 20, 2010. Petitioner then filed its appeal in the Tax Tribunal on July 28, 2010. Rather than filing a response, respondent moved for summary disposition under MCR 2.116(C)(4), arguing that the Tax Tribunal did not have jurisdiction over the appeal because it had not been filed within 35 days of the final assessment. MCL 205.22(1).

The Tax Tribunal concluded that MCL 205.8 adds a parallel notice requirement whenever a taxpayer has filed a proper written request that copies of letters and notices be sent to a representative. The Tax Tribunal further concluded that because respondent did not initially send notice to the appointed representative of petitioner, the time for petitioner's appeal did not begin to run until petitioner's representative was notified. Thus, the Tax Tribunal determined that the appeal was timely and it had jurisdiction. After the Tax Tribunal concluded that the "source documents were well-maintained and adequate to allow the Tribunal to determine the proper sales tax due," the burden was shifted to respondent to show that the amount paid was incorrect. Because respondent failed to satisfy that burden, the Tax Tribunal cancelled the final assessment against petitioner. The correctness of the amount paid is not at issue before us at this time.

The issue before us today is when the 35-day period under MCL 205.22(1) begins to run if the taxpayer has previously filed a written request with the Treasury to send copies of all letters and notices to the taxpayer's representative. This case presents an issue of first impression because this Court has not previously con-

sidered the effect of MCL 205.8 on MCL 205.22 in a published opinion.[1] Petitioner argues that the 35-day period begins to run only once a copy of the final assessment has been received by petitioner's representative. We agree.

Under MCL 205.22(1), a taxpayer "may appeal the contested portion of [an] assessment, decision, or order to the tax tribunal within 35 days, or to the court of claims within 90 days after the assessment, decision, or order." If an appeal is not initiated during these time frames, the assessment, decision, or order "is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack." MCL 205.22(4). The assessment in this case was based on the failure to pay taxes that respondent believed petitioner owed under the General Sales Tax Act, MCL 205.51 *et seq*. When imposing taxes under that act, respondent is required by MCL 205.59(1) to follow the provisions of the revenue collection act, MCL 205.1 *et seq*. Because the sections at issue—MCL 205.8, 205.22, and 205.28—are part of that act, the plain language of MCL 205.59(1) indicates that respondent is required to follow all these sections unless the provisions of the revenue collection act and the General Sales Tax Act conflict, in which event the provisions of the General Sales Tax Act apply.

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[1] Although respondent implies that *Altman Mgt Co v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued April 10, 2001 (Docket No. 216912), p 3, should be persuasive authority in determining the outcome of the instant case, the Tax Tribunal found in *Altman* that the petitioner had not filed a valid written request that copies of letters and notices be sent to an official representative. Thus, this Court did not consider whether respondent is required to give a copy of a final assessment to a taxpayer's official representative if a request is on file, and *Altman* cannot be considered persuasive nor binding. See *Grimm v Dep't of Treasury*, 291 Mich App 140, 149 n 4; 810 NW2d 65 (2010); MCR 7.215(C)(1).

MCL 205.28(1) provides, in relevant part:

> The following conditions apply to all taxes administered under this act unless otherwise provided for in the specific tax statute:
>
> (a) Notice, if required, shall be given either by personal service or by certified mail addressed to the last known address of the taxpayer. Service upon the department may be made in the same manner."

And MCL 205.8 provides:

> If a taxpayer files with the department a written request that copies of letters and notices regarding a dispute with that taxpayer be sent to the taxpayer's official representative, the department shall send the official representative, at the address designated by the taxpayer in the written request, a copy of each letter or notice sent to that taxpayer. A taxpayer shall not designate more than 1 official representative under this section for a single dispute.

The Tax Tribunal held that MCL 205.8 provided a "more specific requirement" and that respondent was required to send all "letters and notices regarding a dispute with a taxpayer" to petitioner's representative as long as petitioner had made a proper written request.

MCL 205.8 imposes an affirmative and mandatory duty on respondent to send "copies of letters and notices regarding a dispute" to taxpayers' official representatives. See *Granger v Naegele Advertising Cos, Inc*, 46 Mich App 509, 512; 208 NW2d 575 (1973) (" 'Shall' is equivalent to the word 'must'."). However, MCL 205.8 is not the kind of other "specific tax statute" contemplated by MCL 205.28(1). By its plain terms, MCL 205.28(1) applies to "this act," of which MCL 205.8 is a part. The proper interpretation of the statute is that the reference in MCL 205.28(1) is to *other* discrete statutes that themselves impose a tax, such as the General Property Tax Act, MCL 211.1 *et seq*.; the

Income Tax Act, MCL 206.1 *et seq*.; or the Use Tax Act, MCL 205.91 *et seq*. The Tax Tribunal's interpretation of the statute would expand this reference to the entire set of Michigan tax statutes, rather than any particular notice requirements specific to each individual tax statute. Notably, the General Sales Tax Act, under which the taxes here were allegedly owed, does not have its own notice requirements. Nevertheless, as noted, the Tax Tribunal correctly held that MCL 205.8 was applicable and binding, and MCL 205.28 must be interpreted in parallel with MCL 205.8 whenever a taxpayer files a valid written notice designating an official representative.

Respondent argues that the Legislature would have specifically referred to MCL 205.28 in MCL 205.8 if it had intended to elevate the level of notice required. Respondent's interpretation would require us to undermine the plain language of a statute on the basis of an impermissible guess at the Legislature's intent. Statutory interpretation requires an holistic approach. *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). A provision that may seem ambiguous in isolation often is clarified by the remainder of the statutory scheme. *Id*. It is a tenet of statutory interpretation that "[c]onflicting provisions of a statute must be read together to produce an harmonious whole and to reconcile any inconsistencies wherever possible." *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 416; 590 NW2d 293 (1999). In reading the provisions of MCL 205.8 and MCL 205.28(1) together, it is clear that these sections should be interpreted as imposing parallel notice requirements whenever a taxpayer has a valid written request on file for respondent to send copies to an official representative. This interpretation gives meaning to both statutory sections' plain language and produces "an harmonious whole." *World Book*, 459

Mich at 416. Thus, the 35-day period of MCL 205.22(1) does not begin to run until notice has been given under both MCL 205.8 and MCL 205.28(1).

Respondent finally argues that a final assessment is not a letter or notice, thus avoiding application of MCL 205.8 to these proceedings. "Notice" is defined as "[l]egal notification required by law or agreement, or imparted by operation of law as a result of some fact[.]" Black's Law Dictionary (9th ed). Respondent defines the final assessments as final bills for taxes due, but however respondent wishes to describe them, they nevertheless function as legal notifications to taxpayers that taxes are due. It was previously the practice of respondent to use the phrasing "notice of final assessment" when it issued assessments. *Livingstone v Dep't of Treasury*, 434 Mich 771, 826; 456 NW2d 684 (1990) (opinion by LEVIN, J.); *Stackpoole v Dep't of Treasury*, 194 Mich App 112, 114; 486 NW2d 322 (1992); *Dow Chem Co v Dep't of Treasury*, 185 Mich App 458, 461-462; 462 NW2d 765 (1990). Furthermore, the plain language of MCL 205.28 uses the word "notice" to refer to final assessments. Thus, a final assessment is a "notice" for the purposes of interpreting MCL 205.8, and that statute imposes a duty on respondent to send a copy of that notice to a petitioner's official representative.

Although respondent sent a letter dated April 21, 2010, to one of petitioner's representatives that indicated a final assessment was issued on September 17, 2009, this letter only gave the representative notice of the *issuance* of the final assessment. The letter itself was not the final assessment, and the plain language of MCL 205.8 requires respondent to send "a copy of" the notice, i.e., the final assessment, not just notice of it. Or, put another way, notice of the notice is not itself the

"notice" contemplated by statute. Thus, the letter did not satisfy the requirements under MCL 205.8.

We conclude that MCL 205.8 must be interpreted in tandem with MCL 205.28(1) as creating parallel notice requirements. If a taxpayer has filed a proper written notice that designates an official representative, then respondent must give notice to both the taxpayer and the taxpayer's representative before the 35-day period under MCL 205.22(1) begins to run. Because petitioner filed its appeal within 35 days after its representative received notice from respondent, the Tax Tribunal had jurisdiction to hear petitioner's appeal. Therefore, we affirm.

RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ., concurred.

SMK, LLC v DEPARTMENT OF TREASURY

Docket No. 306639. Submitted October 2, 2012, at Lansing. Decided October 30, 2012, at 9:10 a.m. Amended, 298 Mich App 801. Leave to appeal granted, 493 Mich 948.

SMK, LLC, filed an appeal on July 29, 2010, in the Tax Tribunal, contesting a final assessment issued by the Department of Treasury that required SMK to pay unpaid sales taxes, penalties, and interest. Despite SMK's prior request, in accordance with MCL 205.8, that the department send copies of all letters and notices to SMK's designated representative, the final assessment had initially been sent only to SMK around June 18, 2009. SMK's designated representative did not receive a copy of the final assessment until July 23, 2010. The department sought summary disposition under MCL 2.116(C)(4), arguing that the tribunal did not have jurisdiction over the appeal because it had not been filed within 35 days of the final assessment as required by MCL 205.22(1). The tribunal denied the motion for summary disposition, concluding that MCL 205.8 adds a parallel notice requirement whenever a taxpayer has filed a proper request that copies of letters and notices be sent to a designated representative and, therefore, the 35-day period had not begun to run until SMK's designated representative received a copy of the final assessment. The tribunal eventually issued an order canceling the final assessment. The department appealed, contending that the tribunal lacked jurisdiction to hear SMK's appeal.

The Court of Appeals *held*:

The Tax Tribunal properly held that it had jurisdiction to hear SMK's appeal.

1. The tribunal correctly held that MCL 205.8 was applicable and binding on the department and that MCL 205.28(1) must be interpreted in parallel with MCL 205.8. These sections impose parallel notice requirements whenever a taxpayer has a valid written request on file for the department to send copies of letters and notices to a designated representative. In such a situation, the 35-day period of MCL 205.22(1) does not begin to run until notice has been given under both MCL 205.8 and MCL 205.28(1) to the taxpayer and the taxpayer's designated representative.

2. The department, when imposing taxes under the General Sales Tax Act, MCL 205.51 *et seq*., is required by § 9(1) of the act, MCL 205.59(1), to follow the provisions of the revenue collection act, MCL 205.1 *et seq*., unless the provisions of the revenue collection act and the General Sales Tax Act conflict, in which event the provisions of the General Sales Tax Act apply. Because the notice statutes at issue in this case, MCL 205.8, 205.22(1), and 205.28, are part of the revenue collection act and the General Sales Tax Act does not have its own notice requirements, MCL 205.59(1) required the department to follow all those statutes.

3. A final assessment by the department is a "notice" for purposes of interpreting MCL 205.8

Affirmed.

1. TAXATION — APPEAL — LIMITATION OF ACTIONS — ASSESSMENTS — DECISIONS — ORDERS — DEPARTMENT OF TREASURY — TAX TRIBUNAL — COURT OF CLAIMS.

A taxpayer may appeal the contested portion of an assessment, decision, or order of the Department of Treasury in the Tax Tribunal within 35 days, or in the Court of Claims within 90 days, after the assessment, decision, or order; if an appeal is not filed within the relevant period, the assessment, decision, or order is final and not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack (MCL 205.22[1] and [4]).

2. TAXATION — CONFLICT OF LAWS — GENERAL SALES TAX ACT — REVENUE COLLECTION ACT.

The Department of Treasury must follow the provisions of the revenue collection act, MCL 205.1 *et seq*., when imposing taxes under the General Sales Tax Act, MCL 205.51 *et seq*., unless the provisions of the revenue collection act and the General Sales Tax Act conflict, in which event the provisions of the General Sales Tax Act apply (MCL 205.59[1]).

3. TAXATION — LIMITATION OF ACTIONS — NOTICES AND LETTERS REGARDING DISPUTES — REPRESENTATIVES DESIGNATED BY TAXPAYERS — PARALLEL NOTICE REQUIREMENTS.

The provisions of MCL 205.8 and MCL 205.28(1) of the revenue collection act impose parallel notice requirements whenever a taxpayer has a valid written request filed with the Department of Treasury requesting that copies of letters and notices regarding a dispute with the taxpayer be sent to a representative designated by the taxpayer; if a taxpayer has filed a proper request, the department must give notice to both the taxpayer and the taxpayer's

designated representative before the 35-day period within which the taxpayer may appeal the contested portion of an assessment, decision, or order of the department in the Tax Tribunal begins to run (MCL 205.22[1]).

4. TAXATION — FINAL ASSESSMENTS — WORDS AND PHRASES — NOTICE.

A final assessment by the Department of Treasury is a "notice" for purposes of the statute that requires the department to send copies of letters and notices regarding a dispute with a taxpayer to the official representative of the taxpayer whenever the taxpayer has filed with the department a valid written request for such notice (MCL 205.8).

The Novis Law Firm, PLLC (by *James H. Novis*), for SMK, LLC.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Scott L. Damich* and *Amy M. Patterson*, Assistant Attorneys General, for the Department of Treasury.

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

PER CURIAM. Respondent appeals as of right the Tax Tribunal's order canceling an assessment against petitioner. This appeal is being considered concurrently with *Fradco, Inc v Dep't of Treasury*, 298 Mich App 292; 826 NW2d 181 (2012), in which the same issue is presented for our consideration. The sole issue before us is whether the Tax Tribunal had the jurisdiction to hear petitioner's appeal of its tax assessment. We conclude that it did and affirm.

This Court's review of a Tax Tribunal decision not relating to property tax valuation or allocation must include, at a minimum, whether the decision was authorized by law and, in cases in which a hearing was required, whether the decision was supported by com-

petent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28. When the resolution of the matter involves statutory interpretation, review de novo is appropriate. *AERC of Mich, LLC v Grand Rapids*, 266 Mich App 717, 722; 702 NW2d 692 (2005). "The purpose of statutory interpretation is to discover and give effect to the Legislature's intentions, and unambiguous statutory language should be enforced as written." *Walgreen Co v Macomb Twp*, 280 Mich App 58, 62; 760 NW2d 594 (2008). "In interpreting a statute, this Court avoids a construction that would render any part of the statute surplusage or nugatory [and] the statute must be read as a whole [with] [i]ndividual words and phrases [being] read in the context of the entire legislative scheme." *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012) (citations omitted).

In the instant case, an audit revealed that petitioner had understated its taxable sales. On the basis of the result of this audit, respondent confirmed that petitioner had understated its taxable sales and issued a final assessment against petitioner requiring it to pay unpaid sales taxes, penalties, and interest. Despite petitioner's request for respondent to send copies of all letters and notices to petitioner's representative, the final assessment was initially sent only to petitioner, on or about June 18, 2010. Petitioner's representative did not receive the final assessment from respondent until July 23, 2010. Petitioner then filed its appeal in the Tax Tribunal on July 29, 2010. Rather than filing a response, respondent moved for summary disposition under MCR 2.116(C)(4), arguing that the Tax Tribunal did not have jurisdiction over the appeal because it had not been filed within 35 days of the final assessment. MCL 205.22(1).

The Tax Tribunal concluded that MCL 205.8 adds a parallel notice requirement whenever a taxpayer has filed a proper written request that copies of letters and notices be sent to a representative. The Tax Tribunal further concluded that because respondent did not initially send notice to the appointed representative of petitioner, the time for petitioner's appeal did not begin to run until petitioner's representative was notified. Thus, the Tax Tribunal determined that the appeal was timely and it had jurisdiction. After the Tax Tribunal concluded that the "source documents were well-maintained and adequate to allow the Tribunal to determine the proper sales tax due," the burden was shifted to respondent to show that the amount paid was incorrect. Because respondent failed to satisfy that burden, the Tax Tribunal cancelled the final assessment against petitioner. The correctness of the amount paid is not at issue before us at this time.

The issue before us today is when the 35-day period under MCL 205.22(1) begins to run if the taxpayer has previously filed a written request with the Treasury to send copies of all letters and notices to the taxpayer's representative. This case presents an issue of first impression because this Court has not previously considered the effect of MCL 205.8 on MCL 205.22 in a published opinion.[1] Petitioner argues that

[1] Although respondent implies that *Altman Mgt Co v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued April 10, 2001 (Docket No. 216912), p 3, should be persuasive authority in determining the outcome of the instant case, the Tax Tribunal found in *Altman* that the petitioner had not filed a valid written request that copies of letters and notices be sent to an official representative. Thus, this Court did not consider whether respondent is required to give a copy of a final assessment to a taxpayer's official representative if a request is on file, and *Altman* cannot be considered persuasive nor binding. See *Grimm v Dep't of Treasury*, 291 Mich App 140, 149 n 4; 810 NW2d 65 (2010); MCR 7.215(C)(1).

the 35-day period begins to run only once a copy of the final assessment has been received by petitioner's representative. We agree.

Under MCL 205.22(1), a taxpayer "may appeal the contested portion of [an] assessment, decision, or order to the tax tribunal within 35 days, or to the court of claims within 90 days after the assessment, decision, or order." If an appeal is not initiated during these time frames, the assessment, decision, or order "is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack." MCL 205.22(4). The assessment in this case was based on the failure to pay taxes that respondent believed petitioner owed under the General Sales Tax Act, MCL 205.51 *et seq*. When imposing taxes under that act, respondent is required by MCL 205.59(1) to follow the provisions of the revenue collection act, MCL 205.1 *et seq*. Because the sections at issue—MCL 205.8, 205.22, and 205.28—are part of that act, the plain language of MCL 205.59(1) indicates that respondent is required to follow all these sections unless the provisions of the revenue collection act and the General Sales Tax Act conflict, in which event the provisions of the General Sales Tax Act apply.

MCL 205.28(1) provides, in relevant part:

> The following conditions apply to all taxes administered under this act unless otherwise provided for in the specific tax statute:
>
> (a) Notice, if required, shall be given either by personal service or by certified mail addressed to the last known address of the taxpayer. Service upon the department may be made in the same manner.

And MCL 205.8 provides:

> If a taxpayer files with the department a written request that copies of letters and notices regarding a dispute with that taxpayer be sent to the taxpayer's official representa-

> tive, the department shall send the official representative, at the address designated by the taxpayer in the written request, a copy of each letter or notice sent to that taxpayer. A taxpayer shall not designate more than 1 official representative under this section for a single dispute.

The Tax Tribunal held that MCL 205.8 provided a "more specific requirement" and that respondent was required to send all "letters and notices regarding a dispute with a taxpayer" to petitioner's representative as long as petitioner had made a proper written request.

MCL 205.8 imposes an affirmative and mandatory duty on respondent to send "copies of letters and notices regarding a dispute" to taxpayers' official representatives. See *Granger v Naegele Advertising Cos, Inc*, 46 Mich App 509, 512; 208 NW2d 575 (1973) (" 'Shall' is equivalent to the word 'must'."). However, MCL 205.8 is not the kind of other "specific tax statute" contemplated by MCL 205.28(1). By its plain terms, MCL 205.28(1) applies to "this act," of which MCL 205.8 is a part. The proper interpretation of the statute is that the reference in MCL 205.28(1) is to *other* discrete statutes that themselves impose a tax, such as the General Property Tax Act, MCL 211.1 *et seq*.; the Income Tax Act, MCL 206.1 *et seq*.; or the Use Tax Act, MCL 205.91 *et seq*. The Tax Tribunal's interpretation of the statute would expand this reference to the entire set of Michigan tax statutes, rather than any particular notice requirements specific to each individual tax statute. Notably, the General Sales Tax Act, under which the taxes here were allegedly owed, does not have its own notice requirements. Nevertheless, as noted, the Tax Tribunal correctly held that MCL 205.8 was applicable and binding, and MCL 205.28 must be interpreted in parallel with MCL 205.8 whenever a taxpayer files a valid written notice designating an official representative.

Respondent argues that the Legislature would have specifically referred to MCL 205.28 in MCL 205.8 if it had intended to elevate the level of notice required. Respondent's interpretation would require us to undermine the plain language of a statute on the basis of an impermissible guess at the Legislature's intent. Statutory interpretation requires an holistic approach. *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). A provision that may seem ambiguous in isolation often is clarified by the remainder of the statutory scheme. *Id.* It is a tenet of statutory interpretation that "[c]onflicting provisions of a statute must be read together to produce an harmonious whole and to reconcile any inconsistencies wherever possible." *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 416; 590 NW2d 293 (1999). In reading the provisions of MCL 205.8 and MCL 205.28(1) together, it is clear that these sections should be interpreted as imposing parallel notice requirements whenever a taxpayer has a valid written request on file for respondent to send copies to an official representative. This interpretation gives meaning to both statutory sections' plain language and produces "an harmonious whole." *World Book*, 459 Mich at 416. Thus, the 35-day period of MCL 205.22(1) does not begin to run until notice has been given under both MCL 205.8 and MCL 205.28(1).

Respondent finally argues that a final assessment is not a letter or notice, thus avoiding application of MCL 205.8 to these proceedings. "Notice" is defined as "[l]egal notification required by law or agreement, or imparted by operation of law as a result of some fact[.]" Black's Law Dictionary (9th ed). Respondent defines the final assessments as final bills for taxes due, but however respondent wishes to describe them, they nevertheless function as legal notifications to taxpayers that taxes are due. It was previously the practice of

respondent to use the phrasing "notice of final assessment" when it issued assessments. *Livingstone v Dep't of Treasury*, 434 Mich 771, 826; 456 NW2d 684 (1990) (opinion by LEVIN, J.); *Stackpoole v Dep't of Treasury*, 194 Mich App 112, 114; 486 NW2d 322 (1992); *Dow Chem Co v Dep't of Treasury*, 185 Mich App 458, 461-462; 462 NW2d 765 (1990). Furthermore, the plain language of MCL 205.28 uses the word "notice" to refer to final assessments. Thus, a final assessment is a "notice" for the purposes of interpreting MCL 205.8, and that statute imposes a duty on respondent to send a copy of that notice to a petitioner's official representative.

We conclude that MCL 205.8 must be interpreted in tandem with MCL 205.28(1) as creating parallel notice requirements. If a taxpayer has filed a proper written notice that designates an official representative, then respondent must give notice to both the taxpayer and the taxpayer's representative before the 35-day period under MCL 205.22(1) begins to run. Because petitioner filed its appeal within 35 days after its representative received notice from respondent, the Tax Tribunal had jurisdiction to hear petitioner's appeal. Therefore, we affirm.

RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ., concurred.

HACKEL v MACOMB COUNTY COMMISSION

Docket No. 310402. Submitted October 5, 2012, at Detroit. Decided October 30, 2012, at 9:15 a.m.

Mark Hackel, the Macomb County Executive, filed a declaratory judgment action in the Macomb Circuit Court, against the Macomb County Commission, seeking a determination that the county executive, and not the commission, had authority to approve Macomb County contracts. Both parties filed motions for summary disposition. The court, John C. Foster, J., granted summary disposition in favor of plaintiff, as well as his request for attorney fees, finding that the county executive had authority to approve Macomb County contracts and that the commission did not have authority to reject or exercise control over contracts the county executive had entered into on behalf of Macomb County. Defendant appealed.

The Court of Appeals *held*:

1. Under MCL 45.514(1), for counties that have a population of fewer than 1.5 million, the county charter sets forth the respective authority, duties and responsibilities of the county executive and the county board of commissioners. The Legislature delegated the function of allocating power in a charter county to the charter commission first, subject to approval by the affected voters. County charter provisions are subject to the same rules of interpretation as are statutes and when charter language is unambiguous it controls. Every word should be given meaning in order to avoid a construction that would render any part of the statute surplusage or nugatory. The court erred by granting summary disposition in favor of the county executive. Section 4.4(d) of the Macomb County Charter states that the commission may approve county contracts. The normal meaning of "approve" in relation to government action implies the power to disapprove. The charter granted the commission authority to approve or reject county contracts. Section 4.4(d) did not limit the commission's approval authority to those contracts for which its approval was otherwise required by the charter, state law or the contract itself; rather, the commission could approve county contracts without limitation. Even if § 4.4(d) of the charter did not grant the commission contract-approval authority, the authority was granted to the

commission under charter §§ 4.4(j) and 4.5. Unless specifically mandated by other charter provisions or by state law, the commission's contract-approval authority was permissive and not required.

2. Contrary to the county executive's argument, use of the phrase "may approve contracts" in § 4.4(d) implied that the Commission could choose not to exercise its approval authority with respect to some contracts and thereby leave approval of those contracts to the county executive. The commission exercised its discretion to confine its contract-approval authority by passing Macomb County Resolution 12-1, which required that the county executive submit only certain types of contracts for its review and approval. Contracts that do not fall within those parameters or that do fall within those parameters but on which the commission fails to act within 21 days, are left to the county executive to approve. Section 3.5(c) of the charter granted the county executive authority to exercise powers granted to him by ordinance but the provisions asserted by the county executive did not grant him contract-approval authority. The county executive has a significant role in the entire contracting process that has allowed him to discharge his enumerated charter duties.

3. The charter does not imply that the county executive possessed a power to approve contracts independent of any delegation of such power by the Commission. To hold otherwise would render § 4.4(d), which grants full discretionary contract-approval authority to the commission, surplusage or nugatory. Further, under the doctrine of *expressio unius est exclusio alterius*, the charter's expression of the commission's authority to approve contracts necessarily operated to exclude a comparable power of the county executive.

4. The separation of powers doctrine, Const 1963, art 3, § 2 applies only to the state level of government, and does not apply to local governmental units. Because the Legislature delegated the function of allocating power in a charter county to the charter commission, MCL 45.514(1), it is the terms of the Macomb County charter itself, rather than caselaw from other states, that governs whether the respective branches of Macomb County's government possess authority to approve contracts. Even if the separation of powers doctrine did apply there was no violation because the doctrine does not preclude the executive and legislative branches from acting in conjunction with one another if it is expressly stated in the Constitution or the charter. While the charter granted the commission contract-approval authority, the county executive retained a broad range of other contract-related powers, which

reflects that both branches shared powers regarding the overall contracting process in a manner consistent with the separation of powers doctrine.

5. Charter counties are subject to restrictions that are imposed by general law. Under MCL 141.434(1), of the Uniform Budgeting and Accounting Act (UBAA), MCL 141.421 *et seq*, unless otherwise provided by law, charter, resolution, or ordinance, the chief administrative officer, such as an elected county executive, has final responsibility for budget preparation, presentation of the budget to the legislative body, and the control of expenditures under the budget and the general appropriations act. MCL 141.434(1) did not require the county executive to approve county contracts because the Macomb County Charter provided "otherwise" by expressly granting that authority to the commission. While the county executive controlled expenditures in many ways, including by negotiating contracts, presenting proposed contracts to the commission and implementing contracts that have been approved, only the commission had contract-approval authority.

6. The trial court erred by holding that Macomb County Ordinance 2012-1, Resolution 12-1, and Resolution 11-23 improperly restricted the county executive's authority to expend appropriated funds by requiring him to seek approval of certain contracts. The trial court's reasoning, that the documents would allow the commission to retain control over funds after they had been appropriated, contrary to MCL 141.422a(3), was erroneous. The commission's contract-approval authority was not superseded by the county executive's authority to control expenditures under the UBAA. In addition, MCL 141.434(1), which granted the county executive authority to control expenditures under the budget and the general appropriations act, does not require that the county executive approve county contracts; rather, the Macomb County Charter provided "otherwise" by expressly granting that authority to the commission.

7. A statute may be declared void for vagueness if (1) it is overbroad and infringes on First Amendment freedoms, (2) it does not provides fair notice of the conduct it regulates, or (3) it gives the trier of fact unstructured and unlimited discretion in concluding whether the statute has been violated. The entire text of a statute is examined and the words of the statute are given their ordinary meaning. The Macomb County ordinance and resolutions were not void for vagueness. The county executive failed to establish or argue that they were penal, deprived any person of property interests, or threatened to infringe on individuals' First Amendment freedoms. In addition, the ordinance and resolutions

provided fair notice of the conduct regulated by adequately describing the types of contracts for which the commission's approval was required.

8. A court may award costs and attorney fees only if specifically authorized by statute, a court rule, or a recognized exception to the American rule, which mandates that a litigant be responsible for his or her own attorney fees. The trial court abused its discretion by granting the county executive's request for attorney fees and by ordering the commission to appropriate additional sums to cover those fees. The inherent-power caselaw on which the court relied did not apply to the facts of this case because the dispute was not about a lack of funding that imperiled the constitutional responsibilities of a branch of government. The county executive failed to establish that he lacked independent financial means to undertake the litigation and did not dispute the commission's assertion that it had appropriated money for him to use for legal matters. The county executive also failed to establish that it was necessary to initiate this litigation to carry out any statutory of constitutional responsibility. In addition, the county executive could propose an appropriations amendment if the appropriated amount was not sufficient.

Reversed and remanded for entry of summary disposition in favor of the commission.

COUNTIES — CHARTER COUNTIES — COUNTY CHARTERS — COUNTY EXECUTIVES AUTHORITY.

For counties that have a population of fewer than 1.5 million, the county charter sets forth the respective authority, duties and responsibilities of the county executive and the county board of commissioners; the Legislature delegated the function of allocating power in a charter county to the charter commission first, subject to approval by the affected voters; county charter provisions are subject to the same rules of interpretation as are statutes and when charter language is unambiguous it controls. [MCL 45.514(1).]

O'Reilly Rancilio, P.C. (by *Lawrence M. Scott* and *Donald P. DeNault, Jr.*), for Mark Hackel.

Clark Hill PLC (by *James E. Brenner* and *Gregory N. Longworth*), for the Macomb County Commission.

Before: K. F. KELLY, P.J., and MARKEY and SERVITTO, JJ.

MARKEY, J. Defendant, Macomb County Commission (the Commission), appeals by right the trial court's order granting summary disposition to plaintiff, Mark Hackel (the Executive), denying summary disposition to the Commission and granting the Executive's request for attorney fees. The Executive brought this action for declaratory and injunctive relief arising from a dispute regarding whether the Executive or the Commission has the authority to approve Macomb County contracts. We reverse and remand for entry of summary disposition for the Commission.

The Commission argues that the trial court erred by granting summary disposition to the Executive and in denying summary disposition to the Commission. We agree. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 243; 704 NW2d 117 (2005). The Commission moved for summary disposition under MCR 2.116(C)(7), (8), and (10), and the Executive moved for summary disposition under MCR 2.116(C)(9) and (10). The trial court, however, did not indicate under which subrule it decided the motions. Because it is not necessary to consider evidence outside the pleadings to resolve this issue, we conclude that review is appropriate under MCR 2.116(C)(8) and (9). See MCR 2.116(G)(5); *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the complaint on the basis of the pleadings alone to determine if the opposing party has stated a claim for which relief can be granted." *Begin v Mich*

Bell Tel Co, 284 Mich App 581, 591; 773 NW2d 271 (2009). A reviewing court must accept all well-pleaded allegations as true and construe them in the light most favorable to the nonmoving party. *Id*. The motion should be granted only if no factual development could possibly justify a recovery. *Id*.

"A motion brought under MCR 2.116(C)(9) seeks a determination whether the opposing party has failed to state a valid defense to the claim asserted against it." *In re Smith Estate*, 226 Mich App 285, 288; 574 NW2d 388 (1997). A motion under MCR 2.116(C)(9) "is analogous to one brought pursuant to MCR 2.116(C)(8) in that both motions are tested by the pleadings alone, with the court accepting all well-pleaded allegations as true." *Id*. When a party's defenses are so untenable as a matter of law that no factual development could possibly deny the plaintiff's right to recovery, the motion is properly granted. *Id*.

This Court reviews de novo questions of law that arise in a declaratory judgment action. *Detroit City Council v Detroit Mayor*, 283 Mich App 442, 449; 770 NW2d 117 (2009). Thus, the interpretation of a statute or a municipal charter is a question of law we review de novo. *Wayne Co*, 267 Mich App at 243. Also, we review de novo whether a statute is void for vagueness, *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 538-539; 669 NW2d 594 (2003), and whether the doctrine of the separation of powers applies, *Harbor Tel 2103, LLC v Oakland Co Bd of Comm'rs*, 253 Mich App 40, 50; 654 NW2d 633 (2002).

"Any county may frame, adopt, amend or repeal a county charter in a manner and with powers and limitations to be provided by general law. . . . The law may permit the organization of county government in form different from that set forth in this constitu-

tion . . . ." Const 1963, art 7, § 2. Pursuant to this authority, the Legislature enacted the charter counties act, MCL 45.501 *et seq*. *Lucas v Wayne Co Election Comm*, 146 Mich App 742, 749; 381 NW2d 806 (1985). MCL 45.514(1) provides, in relevant part:

> A county charter adopted under this act shall provide for all of the following:
>
> (a) In a county having a population of less than 1,500,000, for a salaried county executive, who shall be elected at large on a partisan basis, and for the county executive's authority, duties, and responsibilities. In a county having a population of 1,500,000, or more, a county charter adopted under this act shall provide for a form of executive government described and adopted under [MCL 45.511a].
>
> (b) The election of a legislative body to be known as the county board of commissioners, . . . and for their authority, duties, [and] responsibilities . . . .

MCL 45.511a(8) prescribes the powers and duties to be granted to the county executive in a county having a population of 1.5 million or more. But in counties that have a population of fewer than 1.5 million, MCL 45.514(1) unambiguously says that *the county charter* shall provide for the county executive's authority, duties, and responsibilities and for the county board of commissioners' authority, duties, and responsibilities. MCL 45.514(1) thus represents the Legislature's decision "to delegate the function of allocating power in a charter county to the charter commission in the first instance, subject to final approval by the affected voters." *Oakland Co Comm'r v Oakland Co Executive*, 98 Mich App 639, 650; 296 NW2d 621 (1980).[1]

[1] Although the Legislature has delegated this allocation of duties to charter counties having a population of fewer than 1.5 million, we also recognize that "a charter does not give a county carte blanche to adopt

Therefore, because Macomb County has a population of less than 1.5 million, this Court must look to the provisions of the Macomb County Charter to determine the manner in which that county's voters chose to allocate the respective powers of the Executive and the Commission. *Id*. at 649-650. County charter provisions are subject to the same rules of interpretation as are statutes. *Wayne Co*, 267 Mich App at 244. When the language of a charter provision is unambiguous, it controls. *Id*. at 243. The framers of the charter and the people who voted to adopt it, "must be presumed to have intended that the provision be construed as it reads." *Woods v Bd of Trustees of the Policemen & Firemen Retirement Sys of Detroit*, 108 Mich App 38, 43; 310 NW2d 39 (1981). When construing a statute, every word should be given meaning in order to avoid a construction that would render any part of the statute surplusage or nugatory. *Lapeer Co Abstract & Title Co v Lapeer Co Register of Deeds*, 264 Mich App 167, 172; 691 NW2d 11 (2004).

The Macomb County Charter unambiguously grants to the Commission the discretionary authority to approve contracts. Macomb County Charter, § 4.4 states, in relevant part: "In addition to other powers and duties prescribed in this Charter, the Commission may: . . . (d) Approve contracts of the County[.]" "The normal meaning of 'approve' with relation to government action implies the power to disapprove." *Alco Universal Inc v City of Flint*, 386 Mich 359, 362; 192 NW2d 247 (1971). That is because the term "approve" generally contemplates an exercise of discretion. *Id*.

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whatever provisions it wishes; the county is still subject to the restrictions imposed by general law." *O'Hara v Wayne Co Clerk*, 238 Mich App 611, 613; 607 NW2d 380 (1999). Here, however, the Executive has identified no provisions of general law that preclude the allocation of powers set forth in the Macomb County Charter.

Moreover, the word "may" is used to express opportunity or permission. *Random House Webster's College Dictionary* (2001).[2] Thus, the plain and ordinary meaning of § 4.4(d) is that it affords to the Commission an opportunity and permission to approve or reject county contracts.

Contrary to the Executive's argument, there is no language in § 4.4(d) limiting the Commission's approval authority to what the Executive calls "legislative contracts," i.e., contracts for which the Commission's approval is otherwise required by the charter, by state law, or by the contract itself. Section 4.4(d) plainly says that the Commission "may . . . [a]pprove contracts of the County." There is no language qualifying the phrase "contracts of the County." For example, § 4.4(d) does not modify the phrase "contracts of the County" with additional language such as, "for which the Commission's approval is otherwise required by law, charter, or contract." This Court "long ago recognized that the judiciary cannot read restrictions or limitations into a statute that plainly contains none." *Rusnak v Walker*, 273 Mich App 299, 305; 729 NW2d 542 (2006). Patently, § 4.4(d) does not set forth the Executive's proposed limitations on the Commission's contract-approval authority. Therefore, the framers of the charter and the voters who adopted it presumably intended for § 4.4(d) to mean exactly what it says, i.e., that the Commission may approve contracts of the county, without limitation. *Woods*, 108 Mich App at 43.[3]

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[2] This Court may rely on a dictionary definition to give an otherwise undefined word its plain and ordinary meaning. *Johnson v Pastoriza*, 491 Mich 417, 436; 818 NW2d 279 (2012).

[3] Because § 4.4(d) unambiguously grants to the Commission the authority to approve contracts, we conclude that it is not necessary or appropriate to consider the comments made by various persons during the charter commission proceedings. Where the language of a charter

Further, even if § 4.4(d) did not expressly grant contract-approval authority to the Commission, the Commission could exercise that power pursuant to §§ 4.4(j) and 4.5. Section 4.4(j) says that the Commission may "[e]xercise any power granted by law to charter or general law counties unless otherwise provided by this Charter." Similarly, § 4.5 states:

> The enumeration of powers in this Charter shall not be held or deemed to be exclusive. In addition to the powers enumerated in this Charter, implied by this Charter, or appropriate to the exercise of the powers enumerated in this Charter, the Commission shall have and may exercise all legislative powers which this Charter could specifically enumerate as provided by the Constitution and the laws of the State of Michigan.

Michigan law recognizes that counties possess authority to make contracts. MCL 45.3 states:

> Each organized county shall be a body politic and corporate, for the following purposes, that is to say: To sue and be sued, to purchase and hold real and personal estate for the use of the county; to borrow money for the purpose of erecting and repairing county buildings, and for the building of bridges, *to make all necessary contracts*, and to do all other necessary acts in relation to the property and concerns of the county. [Emphasis added.]

Plainly, MCL 45.3 grants Michigan counties the general power to enter into contracts. *Lapeer Co Abstract*, 264 Mich App at 176.

Therefore, because (1) § 4.4(j) grants to the Commission "any power granted by law to charter or general law counties unless otherwise provided by this Char-

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provision is unambiguous, it is controlling. *Woods*, 108 Mich App at 43; see also *In re certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003) ("[R]esort to legislative history of any form is proper *only* where a genuine ambiguity exists in [a] statute.").

ter," (2) the power to contract is granted by law to counties, and (3) the charter does not provide "otherwise," § 4.4(j) of the charter grants to the Commission the authority to contract. Likewise, § 4.5 of the charter, which grants to the Commission "all legislative powers which this Charter could specifically enumerate as provided by the Constitution and the laws of the State of Michigan," also confers the power to contract granted by MCL 45.3 to counties. Additionally, county boards of commissioners have traditionally approved county contracts. See generally *Lapeer Co Abstract*, 264 Mich App at 175 n 6 (noting that the county's commissioners in that case had approved a contract proposed by the register of deeds); 10 McQuillin, Municipal Corporations (3d ed, 2009 rev vol), § 29:19, p 402 (stating that the governing power of a county generally lies in the board of county commissioners). We also note that at the state level our Supreme Court has recognized that the Legislature has the authority to approve contracts absent a constitutional limitation. *Taxpayers of Mich Against Casinos v Michigan*, 471 Mich 306, 328; 685 NW2d 221 (2004). We therefore conclude that the authority to approve contracts falls within the Commission's residual legislative powers under § 4.5. Accordingly, even if § 4.4(d) did not expressly grant contract-approval authority to the Commission, § 4.4(j) and § 4.5 of the charter would convey such authority to the Commission.

Of course, the fact that the Commission has *permission* to approve or reject contracts does not mean that it *must* exercise that authority. Nothing in § 4.4(d) suggests that the Commission is *required* to review and approve all county contracts. Indeed, such a construction would contravene use of the permissive word "may." Therefore, according to its plain meaning, § 4.4(d) does not nullify other charter provisions *requir-*

ing the Commission to approve certain types of contracts, i.e., intergovernmental contracts and collective bargaining agreements. See Macomb County Charter, §§ 3.10(a) and 7.3.2. Whereas the Commission *must* approve the types of contracts identified in those provisions, the grant of *permission* to the Commission in § 4.4(d) to approve or disapprove contracts is discretionary, thereby allowing the Commission, if it so chooses, to approve contracts for which its approval is not mandated by other charter provisions or by state law.

And in fact, the Commission has exercised this discretion to confine its exercise of contract-approval authority. The Commission's new contract policy requires the Executive to submit only certain types of contracts for its review and approval, including contracts for the acquisition, leasing, or sale of real property or buildings, contracts providing for the payment of $35,000 or more in any fiscal year, and contracts involving construction projects in an amount of $100,000 or more. Macomb County Resolution 12-1, § II.B.3. Contracts that do not fall within the enumeration of the contract policy, or that fall within the policy but on which the Commission fails to act within 21 days, are left to the Executive to approve. Resolution 12-1, §§ II.B.1(c) and II.D.3. Further, the Executive may approve contracts required to operate his office if they fall within the appropriated amounts. Resolution 12-1, § II.C.1. The Executive may also approve contracts that must remain confidential for effective law enforcement and contracts necessitated by public emergencies. Resolution 12-1, §§ II.C.4 and II.C.5.

The Executive argues, however, that if he lacks independent authority under the charter to approve contracts, then the Commission has no authority to delegate contract-approval powers to him. Contrary to

the Executive's argument, the charter contemplates the delegation of powers to the Executive. By stating that the Commission "may" approve contracts, § 4.4(d) implicitly recognizes that the Commission may choose *not* to exercise its approval authority with respect to some contracts, thereby necessarily leaving the approval of those contracts to the Executive. Moreover, § 3.5(c) of the charter expressly refers to the delegation of powers to the Executive and provides for the Executive to exercise powers granted to him by ordinance:

> The Executive has the authority, duty, and responsibility to:
>
> * * *
>
> (c) Discharge the duties granted the Executive by this Charter, law, *or ordinance*, and exercise all incidental powers necessary or convenient for the discharge of the duties and functions specified in this Charter *or lawfully delegated to the Executive*. [Emphasis added.]

Therefore, the Executive's argument that the Commission lacks authority to delegate contract-approval powers to the Executive is unavailing.

Next, the Executive contends that various charter provisions imply that he possesses a power to approve contracts *independent of* any delegation of such a power by the Commission. But recognizing an implicit power to approve contracts on the part of the Executive would essentially nullify the Commission's express authority under § 4.4(d). Courts must avoid a construction that would render any part of a statute surplusage or nugatory. *Wayne Co*, 267 Mich App at 244; *Lapeer Co Abstract*, 264 Mich App at 172. As our Supreme Court has noted, the power to approve government action implies the power to *disapprove* such action. *Alco Universal Inc*, 386 Mich at 362. If the Executive could

simply approve a contract without submitting it to the Commission for approval, then the Commission's authority to approve *or disapprove* the contract would be rendered meaningless. Cf. *Detroit City Council*, 283 Mich App at 451 (holding that if this Court were to recognize a mayoral veto power over the city council's authority to disapprove an action, then the statute granting to the city council the sole authority to disapprove the action would be nullified).

In addition, the Executive's argument fails under "the doctrine of *expressio unius est exclusio alterius*, or inclusion by specific mention excludes what is not mentioned." *Id.* at 448. This doctrine is "a rule of construction that is a product of logic and common sense. The doctrine characterizes the general practice that when people say one thing they do not mean something else." *Id*. at 456 (citations and quotation marks omitted). In *Detroit City Council*, a statute granted to the legislative body of certain cities the authority to disapprove the transfer of a convention center to a regional authority but was silent regarding granting comparable authority to the mayor of such a city. *Id*. at 446, 456. The city council passed a resolution disapproving the transfer; the mayor vetoed the resolution, and the city council did not override the veto. *Id*. at 446. This Court held that "under the doctrine of *expressio unius est exclusio alterius*, the Legislature's expression of the city council's disapproval power operates to exclude a mayoral veto power of that disapproval." *Id*. at 456. This Court declined to read into the statute a mayoral veto power that was not expressly stated. *Id*. at 461. Likewise, here, § 4.4(d) expressly grants to the Commission the authority to approve contracts. No such authority is granted to the Executive. As discussed, the Commission's power to approve a contract includes the power to disapprove a contract. *Alco Uni-*

versal Inc, 386 Mich at 362. The Commission thus could not exercise its power to *disapprove* a contract if the Executive possessed an implied power to approve the same contract. Accordingly, the charter's expression of the Commission's authority to approve contracts necessarily operates to exclude a comparable Executive power. *Detroit City Council*, 283 Mich App at 456.

At any rate, the charter provisions on which the Executive relies do not imply a power to approve contracts. Section 8.6.1 requires the Executive to "prepare and administer a comprehensive balanced budget in a manner which assures coordination among Agencies." Section 8.10 requires the Commission to adopt "comprehensive policies and procedures governing the awarding of contracts, including the procurement and handling of services, supplies, materials, and equipment[,]" and then requires the Executive to "implement the policies adopted by the Commission, including requirements for competitive bidding and the use of sealed bids for purchases and contracts specified by ordinance." Section 3.5(a) grants the Executive the authority to "[s]upervise, coordinate, direct, and control all County departments . . ., facilities, operations, and services except as otherwise provided by this Charter." Section 3.5(c) gives the Executive the authority to "[d]ischarge the duties granted the Executive by this Charter, law, or ordinance, and exercise all incidental powers necessary or convenient for the discharge of the duties and functions specified in this Charter or lawfully delegated to the Executive."

Not one of these provisions entails the Executive's approval of contracts. The Executive's duty to administer a budget does not require that he approve contracts. The Executive can administer the budget by implementing existing contracts that have been ap-

proved. When a new contract is required, the Executive can negotiate the contract, submit it to the Commission, and, once it is approved, implement it. Similarly, the Executive's responsibility to implement the Commission's policies and procedures governing the award of contracts does not require the Executive to approve the contracts. The Executive can fulfill his responsibilities by following the Commission's policies and procedures for the awarding of contracts, including following requirements for competitive bidding and the use of sealed bids, and then submitting any proposed contracts to the Commission for approval. The Executive's authority to direct and control county departments, facilities, operations, and services does not require that he approve contracts.

Nor is the mere act of approving contracts an incidental power that is necessary or convenient to discharge the Executive's enumerated duties. Approval is but one step in the contracting process. As the Commission concedes, the Executive has significant powers related to contracting, including implicit or explicit authority to (1) decide what contracts to negotiate, (2) the terms of those contracts, (3) whether to submit a particular contract to the Commission for its review, (4) veto a resolution approving a contract, subject to the Commission's right to override that veto, (5) approve contracts that do not require Commission approval under the Commission's contract policy, (6) sign contracts on behalf of the County, and (7) implement existing contracts that have been approved. As compared to the Executive, the Commission plays a relatively passive role requiring it to simply review and approve or disapprove whatever contracts that the Executive has negotiated and chosen to submit to the Commission. In short, the Executive's role in the entire

contracting process is significant and certainly suffices to allow him to discharge his enumerated charter duties.

Next, the separation of powers doctrine does not require that the Executive have the authority to approve all contracts. Const 1963, art 3, § 2 provides:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

However, "the separation of powers doctrine stated in Const 1963, art 3, § 2 applies only to the state level of government and therefore does not apply to local governmental units." *Harbor Tel*, 253 Mich App at 50-51, citing *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 266-268; 566 NW2d 514 (1997), and *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 586-588; 640 NW2d 321 (2001). Further, no basis exists to consider foreign authorities regarding whether the executive or legislative branches have authority to approve contracts. As discussed earlier, our Legislature has "delegate[d] the function of allocating power in a charter county to the charter commission in the first instance, subject to final approval by the affected voters." *Oakland Co Comm'r*, 98 Mich App at 650. It is, therefore, the terms of the Macomb County Charter itself, rather than case law from other states, that governs whether the respective branches of Macomb County's government possess authority to approve contracts.

At any rate, even if the separation of powers doctrine is deemed to apply, it does not preclude the executive and legislative branches from acting in conjunction with one another "if it is so expressly stated in the

Constitution or the charter of the political unit governed thereby." *Local 321, State, Co & Muni Workers of America v Dearborn*, 311 Mich 674, 677; 19 NW2d 140 (1945). As discussed above, the Macomb County Charter grants specific responsibilities to *both* the Commission and the Executive regarding contracts. In no sense is the "whole power" of one branch being "exercised by the same hands which possess the whole power" of the other branch, *id*., nor is one branch being encroached or aggrandized at the expense of the other, *Hopkins v Parole Bd*, 237 Mich App 629, 636; 604 NW2d 686 (1999). Although the Commission has authority to *approve* contracts, Macomb County Charter § 4.4(d), the Executive retains a broad range of other contract-related powers (either implicitly or explicitly, as the Commission concedes), including the power to decide what contracts to negotiate and submit to the Commission, to sign contracts, to veto resolutions approving contracts (subject to a possible override by the Commission), and to implement existing contracts, Macomb County Charter, §§ 3.9, 3.17, 8.6.1, and 8.10. Thus, the charter's dispersal of overlapping responsibilities reflects that the legislative and executive branches of Macomb County's government share power regarding the overall contracting process in a manner consistent with the separation-of-powers doctrine. *Hopkins*, 237 Mich App at 636. Accordingly, the charter's grant of contract-approval authority to the Commission does not offend separation-of-powers principles.

Next, we agree with the Commission that the Uniform Budgeting and Accounting Act (UBAA), MCL 141.421 *et seq*., does not require granting contract-approval powers to the Executive. Charter counties are subject to restrictions that are imposed by general law. *O'Hara v Wayne Co Clerk*, 238 Mich App 611, 613; 607 NW2d 380 (1999). The UBAA provision at issue pro-

vides: "Unless otherwise provided by law, charter, resolution, or ordinance, the chief administrative officer[4] shall have final responsibility for budget preparation, presentation of the budget to the legislative body, and the control of expenditures under the budget and the general appropriations act." MCL 141.434(1). This provision does not require that the Executive approve county contracts because, as discussed, Macomb County Charter, § 4.4(d) expressly provides "otherwise" by granting that authority to the Commission. But even if this UBAA provision somehow superseded the charter, the Executive's authority to control expenditures does not authorize him to enter into contracts without the Commission's approval. The Executive may control expenditures in numerous other ways, though, including by negotiating contracts, presenting proposed contracts to the Commission, and implementing contracts that have been approved.

The trial court also observed that the UBAA defines an "appropriation" as "an authorization granted by a legislative body to incur obligations and to expend public funds for a stated purpose." MCL 141.422a(3). The court then noted that MCL 141.436(1) provides that "the legislative body of each local unit shall pass a general appropriations act for all funds except trust or agency, internal service, enterprise, debt service or capital project funds for which the legislative body may pass a general appropriation act." Further, the court cited MCL 141.436(3), which states:

> The general appropriations act shall set forth the amounts appropriated by the legislative body to defray the expenditures and meet the liabilities of the local unit for

[4] An elected county executive is the "chief administrative officer" of a county under the relevant definition of that term set forth in MCL 141.422b(3)(f).

> the ensuing fiscal year, and shall set forth a statement of estimated revenues, by source, in each fund for the ensuing fiscal year.

Then, relying in part on an Attorney General (AG) opinion, OAG, 1979-1980, No 5816, pp 1082-1083 (November 17, 1980), the trial court concluded:

> Under MCL 141.436, the Board of Commissioners is required to pass a general appropriations act. Once an appropriation has been made, the expenditure of the appropriated funds is "authorized." That is, the department which is the recipient of the appropriation is now permitted "to incur obligations and to expend [the] funds. . . ." MCL 141.422a(3). There is nothing in the language of the UBAA which suggest [sic] that a county board of commissioners is free to renege on the appropriation, or to exercise continuing control over the appropriated funds.
>
> Macomb County Ordinance 2012-1, Resolution 12-1, and Resolution 11-23 purport to restrict the Executive's authority to expend appropriated funds by requiring him to seek approval of certain contracts. In other words, if these documents are given effect, the Board of Commissioners would effectively retain control over funds even after the funds have been appropriated. Since a retention of control over the funds post-appropriation is not allowed under the UBAA, the Court finds that Ordinance 2012-1, Resolution 12-1, and Resolution 11-23 contravene the UBAA and are invalid.

We disagree with the trial court's conclusion. This portion of the trial court's analysis addressed provisions related to the Commission's obligation to pass an appropriations act and the definition of an "appropriation." But the issue here does not concern the meaning of "appropriation" or whether the Commission has passed or must pass appropriation acts. Rather, the central question is whether the Commission or the Executive may approve county contracts and whether affording such authority to the Commission is super-

seded by the Executive's authority to control expenditures. The most relevant, specific UBAA provision on that question is MCL 141.434(1) which grants to the Executive the authority to control expenditures under the budget and the general appropriations act "[u]nless otherwise provided by law, charter, resolution, or ordinance[.]" Thus, regardless of what the UBAA says about the meaning of "appropriation" or the Commission's duty to pass appropriation acts, MCL 141.434(1) expressly qualifies the Executive's authority to control expenditures by the phrase "[u]nless otherwise provided by law, charter, resolution, or ordinance[.]" As discussed, Macomb County Charter, § 4.4(d) expressly grants to the Commission, and not to the Executive, the authority to approve contracts. To the extent, then, that this charter provision provides "otherwise" from what is set forth in the UBAA, the charter's allocation of power is expressly permitted by MCL 141.434(1). And because MCL 141.434(1) is the most specific UBAA provision addressing the chief administrative officer's control of expenditures, it must control over any UBAA provisions that are deemed to conflict with it. See *Gagnon v Glowacki*, 295 Mich App 557, 576; 815 NW2d 141 (2012) (noting that a specific statutory provision controls over a general statutory provision regarding the same matter).

Furthermore, AG opinions are not precedentially binding on courts. *Danse Corp v City of Madison Hts*, 466 Mich 175, 182 n 6; 644 NW2d 721 (2002). The Attorney General's opinion concerned whether a county board of commissioners, when adopting a general appropriations act, could "require elected county officials or other administrative officers of budgetary centers, to seek permission of the chief administrative officer or fiscal officer of the county in expending designated 'line-items' within an approved budget." OAG, 1979-1980, No 5816, p 1083

(November 17, 1980). The Attorney General concluded that requiring such "pre-expenditure permission" would violate the UBAA and the constitutional separation of powers doctrine. *Id*. The Attorney General's opinion did not address the precise issue of whether a county commission could exercise its authority under a charter to approve contracts of the county. In any event, to the extent that the Attorney General's opinion is read to say that county boards of commissioners may not approve contracts, the Attorney General's opinion is not binding, *Danse Corp*, 466 Mich at 182 n 6, and does not, in our view, reflect a persuasive interpretation of the UBAA or a proper understanding of the separation of powers doctrine, as discussed earlier.

Next, the Executive has not established that the Macomb County ordinance and contract policy are void for vagueness. "All ordinances are presumed to be constitutional . . . unless their unconstitutionality is clearly apparent." *Truckor v Erie Twp*, 283 Mich App 154, 161-162; 771 NW2d 1 (2009). The party challenging the constitutionality of an ordinance has the burden to establish that it is clearly unconstitutional. *Id*. at 162. "Also, a statute or ordinance is not unconstitutional simply because it is unwise or unfair." *Lansing v Hartsuff*, 213 Mich App 338, 344; 539 NW2d 781 (1995). "The 'void for vagueness' doctrine was primarily developed within the context of penal statutes and of laws threatening infringement of individuals' First Amendment rights." *In re Metro Council 23, American Federation of State, Co & Muni Employees, AFL-CIO*, 89 Mich App 564, 573; 280 NW2d 600 (1979). The doctrine might also be asserted to challenge a property-use regulation. *Yankee Springs Twp v Fox*, 264 Mich App 604, 606; 692 NW2d 728 (2004).

> A statute may be declared void for vagueness if (1) it is overbroad and infringes First Amendment freedoms, (2) it does not provide fair notice of the conduct it regulates, or (3) it gives the trier of fact unstructured and unlimited discretion in concluding whether the statute has been violated. Vagueness challenges that do not involve a challenge to First Amendment freedoms are examined in light of the facts of the particular case. . . . In determining whether a statute is void for vagueness, the entire text of the statute is examined and the words of the statute are given their ordinary meanings. When a statute is challenged on the basis that it fails to provide fair notice, the statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required. [*STC, Inc*, 257 Mich App at 539 (citations omitted).]

Here, the Executive's vagueness challenge fails because he has not established, or even argued, that Macomb County Resolution 11-23 (requiring that county contracts over $15,000 must be approved by the commission), Macomb County Ordinance 2012-1 (detailing policies and procedures governing the award of county contracts), and Macomb County Resolution 12-1 (detailing amendments to resolution 11-23) are penal, effectuate a deprivation of property interests, or threaten to infringe on individuals' First Amendment freedoms. The ordinance and resolutions thus do not fall within the category of enactments against which a void-for-vagueness challenge is usually asserted. But to the extent that a void-for-vagueness claim could be made, no basis exists to conclude that the ordinance and resolutions infringe on First Amendment freedoms, fail to provide fair notice of the conduct regulated, or give a trier of fact unstructured and unlimited discretion in determining whether they have been violated. *Id.* at 539. In our view, Resolution 12-1, § II.B.3 adequately describes the types of contracts for which the Commis-

sion's approval is required and thus affords adequate notice. Accordingly, the Executive's void-for-vagueness challenge fails.

Next, the Commission argues that the trial court abused its discretion by granting the Executive's request for attorney fees. We agree. Generally, this Court reviews for an abuse of discretion an award of attorney fees. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 438; 695 NW2d 84 (2005). A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Augustine v Allstate Ins Co*, 292 Mich App 408, 424; 807 NW2d 77 (2011). "[A]ny questions of law that affect the determination are reviewed de novo." *Hines*, 265 Mich App at 438.

A court may award costs and attorney fees only if specifically authorized by a statute, a court rule, or a recognized exception to the American rule (which mandates that a litigant be responsible for his or her own attorney fees). *In re Temple Marital Trust*, 278 Mich App 122, 139; 748 NW2d 265 (2008). In this case, the trial court granted the Executive's request for attorney fees on the basis of what the court viewed as "analogous" case law concerning the judiciary's inherent power to employ counsel to secure necessary funding.

In *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 143; 719 NW2d 553 (2006), our Supreme Court recognized that the judiciary has an " 'inherent power' to compel appropriations sufficient to enable it to carry out its constitutional responsibilities [as] a function of the separation of powers provided for in the Michigan Constitution." This "inherent power" is "sharply circumscribed" and "contemplates only the power, when an impasse has arisen between the legislative and judicial branches, to determine levels of appropriation

that are 'reasonable and necessary' to enable the judiciary to carry out its constitutional responsibilities." *Id*.

This Court has held that the judiciary's "inherent power . . . include[es] the power to employ counsel and recover reasonable attorney fees arising out of such inherent power litigation." *46th Circuit Trial Court v Crawford Co (On Remand)*, 273 Mich App 342, 344-345; 729 NW2d 914 (2006) (quotation marks, brackets, and citation omitted). Recovery of reasonable attorney fees is not limited to cases in which the inherent-powers litigation is successful. *Id*. at 345. Otherwise, "[t]he judiciary, only contemplating litigation because of a perceived budget shortfall, would be hard-pressed to employ outside counsel whose unreimbursed fees might exacerbate that shortfall." *Id*. at 345-346. "The judicial branch, which has no independent financial means to undertake litigation concerning funding, must be empowered to undertake that litigation when necessary to protect the judicial function." *Id*. at 346 n 1.

This caselaw regarding the judiciary's inherent power to compel necessary and reasonable funding, including reasonable attorney fees, does not apply here. The present dispute is not about a lack of funding that imperils the constitutional responsibilities of a branch of government. It instead arises out of a dispute whether the Executive or the Commission has authority to approve county contracts. Cf. *Wayne Co Sheriff v Wayne Co Bd of Comm'rs*, 148 Mich App 702, 704, 712; 385 NW2d 267 (1983) (holding that the rationale of requiring the payment of judges' attorney fees to ensure the autonomy of the judiciary was inapplicable in a case involving budget cuts that eliminated a county sheriff's patrol and investigation division).

Moreover, the Executive has failed to establish that he lacks independent financial means to undertake this

litigation. The Executive has not disputed the Commission's assertion that "the Commission has appropriated money for the Executive to use for legal matters." If the amount appropriated is insufficient to fund this litigation, the Executive may propose an appropriation amendment. Macomb County Charter, § 8.11.2 provides:

> If the Executive certifies to the Commission that expenditures have exceeded appropriated levels and submits a proposed appropriation amendment, the Commission shall amend appropriations to avoid the deficit. If the Commission fails to amend the appropriation ordinance within 45 days after the certification of the excess expenditures, the requested appropriation amendment submitted by the Executive becomes effective.

The Commission states that the Executive has never submitted a proposed appropriation amendment, and the Executive has not disputed this assertion.

In general, this Court does not interfere in a county board of commissioners' appropriations decisions absent a failure to budget funds to allow a county executive officer to fulfill statutory or constitutional duties. *Wayne Co Prosecutor v Wayne Co Bd of Comm'rs*, 93 Mich App 114, 121-123; 286 NW2d 62 (1979). "The judiciary will not involve itself with the truly discretionary appropriations decisions of a county board, unless the action taken is so capricious or arbitrary as to evidence a total failure to exercise discretion." *Id*. at 122-123. See also *Wayne Co Sheriff*, 148 Mich App at 704-705. The Executive has not claimed or established in this case that the Commission has failed to appropriate funds needed to carry out any statutory or constitutional duties. Indeed, it is difficult to understand how the Executive could establish such a claim where (1) he has not shown that initiation of this litigation was

necessary to carry out any statutory or constitutional responsibilities, and (2) in any event, he has been allocated funds to use for legal matters. And, if that allocation were inadequate, he may submit an appropriation amendment as expressly permitted under the charter. Therefore, because no basis exists to order the Commission to appropriate additional sums to cover the Executive's attorney fees, the trial court abused its discretion in doing so.

We reverse and remand for entry of summary disposition for the Commission. We do not retain jurisdiction.

K. F. KELLY, P.J., and SERVITTO, J., concurred with MARKEY, J.

In re APPLICATION OF INTERNATIONAL TRANSMISSION COMPANY FOR EXPEDITED SITING CERTIFICATE

Docket Nos. 303009 and 303040. Submitted October 9, 2012, at Lansing. Decided November 6, 2012, at 9:00 a.m. Reversed in part, 493 Mich 947.

International Transmission Company (ITC) filed an application in the Public Service Commission (PSC) for an expedited siting certificate to construct a wind energy transmission line pursuant to part 4 of the Clean, Renewable, and Efficient Energy Act, 2008 PA 295, MCL 460.1141 *et seq*. The Association of Businesses Advocating Tariff Equity (ABATE), the Michigan Public Power Agency (MPPA), and the Michigan Municipal Electric Association (MMEA) intervened, arguing that ITC's proposed transmission line did not meet the requirements of 2008 PA 295; that 2008 PA 295 did not provide authorization for construction of a transmission line because that authorization was reserved to 1995 PA 30, which governs the location and construction of major electric transmission lines; and that 2008 PA 295 was unconstitutional. The PSC issued an order granting ITC's application, ruling that the proposed transmission line met the requirements of 2008 PA 295 and declining to resolve the alleged conflict between 2008 PA 295 and 1995 PA 30. The Court of Appeals consolidated the appeal of ABATE in Docket No. 303009 with that of MPPA and MMEA in Docket No. 303040.

The Court of Appeals *held*:

1. The PSC's interpretation that issuance of an expedited siting certificate under part 4 of 2008 PA 295 authorized construction of a wind energy transmission line was reasonable; however, because this interpretation created an exception to the mandatory nature of 1995 PA 30, it constituted an amendment, alteration, or revision of 1995 PA 30 and therefore violated the reenactment and publication requirements of Const 1963, art 4, § 25. Because no exceptions to these requirements applied, 2008 PA 295 must be construed to require a party seeking to construct a wind energy transmission line under its provisions to also comply with the requirements of 1995 PA 30 to avoid rendering 2008 PA 295 unconstitutional. Under 1995 PA 30, an independent transmission company that plans to construct a major transmission line in

Michigan must submit a construction plan to the PSC and be granted a certificate of public convenience and necessity before beginning construction. The provisions of 2008 PA 295 set forth a process under which the PSC can issue expedited siting certificates to facilitate the transmission of electricity generated by wind energy conversion systems in wind energy resource zones. While 2008 PA 295 does not expressly state that a siting certificate authorizes construction, the PSC's ruling that it did was reasonable in light of the definitions of siting and construction, the fact that 2008 PA 295 provides that a siting certificate conclusively establishes public convenience and necessity, the fact that the application process itself arguably constitutes construction given the definitions of siting and construction, and the implication in MCL 460.1157 that construction is permitted with an expedited siting certificate. The argument that the conflict between this interpretation of 2008 PA 295 and 1995 PA 30 could be resolved by applying the supremacy clause in 2008 PA 295 fails because that clause applies only to conflicting local legal authority, whereas 1995 PA 30 provides that it controls in any conflict between it and any other state law, thus rendering inapplicable the rule that a more specific, later-enacted statute controls in the event of an irreconcilable conflict between two statutes. Therefore, by allowing a transmission company to begin construction of a transmission line without complying with the mandatory provisions of 1995 PA 30, 2008 PA 295 violated Const 1963, art 4, § 25, which states that no law shall be revised, altered or amended by reference to its title only and requires that the section or sections of the act altered or amended be reenacted and published at length. The exception to these requirements for laws that amend only by implication does not apply given that the conflict between 1995 PA 30 and 2008 PA 295 was not accidental or inadvertent but rather resulted from the Legislature's knowledge of 1995 PA 30 and its intent to abrogate that rule with respect to specific wind energy transmission lines, as evidenced by the fact that 2008 PA 295 included explicit references to and adopted definitions from 1995 PA 30. Likewise, the exception to the requirements of Const 1963, art 4, § 25 for laws that are complete in themselves does not apply because, comparing its provisions with the prior laws left in force, 2008 PA 295 is not complete on the subject with which it deals given that an alternative mechanism for permitting construction of transmission lines exists in 1995 PA 30. Whether the reenactment and publication requirements of Const 1963, art 4, § 25 would have been unduly burdensome was not a consideration when determining whether that provision was violated. The only way to interpret the statutes harmoniously without rendering 2008 PA 295 uncon-

stitutional was to conclude that, regardless of whether a siting certificate is obtained under 2008 PA 295, 1995 PA 30 mandates compliance with its provisions relating to public convenience and necessity before construction could commence. Although this constituted an absurd result that was manifestly inconsistent with the legislative intent to create an expedited process, the rule that courts should construe statutes to avoid absurd results cannot render an unconstitutional act constitutional.

2. The decision to require a party seeking to construct a wind energy transmission line under 2008 PA 295 to also comply with the requirements of 1995 PA 30 applies prospectively. While judicial decisions are generally given full retroactive effect, a decision that clearly establishes a new principle of law may be given prospective application after consideration of (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. Although the Court of Appeals interpreted 2008 PA 295 in the only manner possible without rendering it unconstitutional, because that result was absurd, clearly contrary to the intent of the Legislature, and a departure from the reasonable but erroneous interpretation adopted by the PSC, its holding was akin to the announcement of a new rule of law, rendering consideration of prospective application appropriate. First, prospective application would further the purpose of the new rule, which was to correct an error in the interpretation of 2008 PA 295 to prevent it from being rendered unconstitutional. Second, ITC and other companies invested substantial resources in reliance on the reasonable assumption, and the PSC's ruling, that construction was authorized under 2008 PA 295 without the necessity of compliance with 1995 PA 30. Third, prospective application would minimize the effect of the decision on the administration of justice by avoiding additional litigation regarding ITC's completed and ongoing construction, preventing the use of PSC resources on duplicative reconsideration of evidence under 1995 PA 30 that had already been considered and used to authorize construction under 2008 PA 295, and providing the Legislature the opportunity to fix the absurd result created by this required interpretation without stopping the ongoing construction of transmission lines that are necessary to help energy companies meet the 2015 deadline for green energy mandates. The decision was given immediate effect pursuant to MCR 7.215(F)(2) and applies only to applications brought under 2008 PA 295 on or after the date of this opinion.

3. The PSC's conclusion that the transmission line proposed by ITC was of an appropriate capability was not erroneous. MCL

460.1153(3)(d) requires a proposed transmission line to be of appropriate capability to enable the wind potential of the wind energy resource zone to be realized. The proposed transmission line had a 5,000 MW capacity, and the estimated wind potential in the region was between 2,367 MW and 4,236 MW. A planned transmission line should not be built to a size that may become overloaded. MCL 460.1153(3)(d) does not authorize a transmission line that will realize some, most, or even a reasonably anticipated amount of wind potential; rather, the line must be capable of enabling the realization of the wind potential. Any number less than the maximum estimated capacity arguably would have failed to meet this standard. The fact that ITC's transmission line would exceed the amount necessary to meet the required renewable energy standard is in keeping with the Legislature's mandate of a minimum rather than a maximum amount.

4. The challenge to the PSC's conclusion that ITC's proposed route was feasible and reasonable was unpreserved and unsupported and therefore abandoned.

PSC order affirmed in result.

1. PUBLIC UTILITIES — CONSTRUCTION OF WIND ENERGY TRANSMISSION LINES — EXPEDITED SITING CERTIFICATES — SUBMISSION OF CONSTRUCTION PLANS — CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY.

An independent transmission company seeking an expedited siting certificate for construction of a wind energy transmission line under part 4 of 2008 PA 295 must submit a construction plan to the Public Service Commission and be granted a certificate of public convenience and necessity pursuant to 1995 PA 30 before beginning construction.

2. PUBLIC UTILITIES — CONSTRUCTION OF WIND ENERGY TRANSMISSION LINES — EXPEDITED SITING CERTIFICATES — PROSPECTIVE APPLICATION OF JUDICIAL DECISIONS.

Judicial decisions are generally given full retroactive effect; a decision that clearly establishes a new principle of law may be given prospective application if warranted by consideration of (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice; the decision requiring independent transmission companies seeking an expedited siting certificate for construction of a wind energy transmission line under part 4 of 2008 PA 295 to also comply with 1995 PA 30 before beginning construction applies prospectively.

3. PUBLIC UTILITIES — CONSTRUCTION OF WIND ENERGY TRANSMISSION LINES — APPROPRIATE CAPABILITY.

MCL 460.1153(3)(d) requires a proposed transmission line to be of appropriate capability to enable the wind potential of a wind energy resource zone to be realized; a capability that cannot accommodate the maximum estimated wind potential arguably fails to meet this standard.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Kristin M. Smith*, *Robert W. Beach*, *Brian W. Farkas*, *Steven D. Hughey*, and *Patricia S. Barone*, Assistant Attorneys General, for the Public Service Commission.

Dickinson Wright PLLC (by *Peter H. Ellsworth*, *Jeffery V. Stuckey*, and *Michael J. Pattwell*) and *Jim B. Weeks* for the Michigan Public Power Agency and the Michigan Municipal Electric Association.

Dykema Gossett PLLC (by *Albert Ernst*, *Gary P. Gordon*, and *Shaun M. Johnson*) for International Transmission Co.

Clark Hill PLC (by *Robert A. W. Strong*) for the Association of Businesses Advocating Tariff Equity.

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM. In these consolidated cases, appellant Association of Businesses Advocating Tariff Equity (ABATE) (Docket No. 303009) and appellants Michigan Public Power Agency (MPPA) and Michigan Municipal Electric Association (MMEA) (Docket No. 303040) appeal the February 25, 2011, order entered by the Michigan Public Service Commission (PSC) granting appellee International Transmission Company (ITC) an expedited siting certificate for a wind energy transmis-

sion line and authorizing construction of that line on ITC's proposed route.[1] We hold that the PSC properly issued the siting certificate but that its conclusion that construction is permitted by the certificate was erroneous. However, because we are mindful of the effects of our holding, we conclude that limiting it to prospective application is appropriate.

I. BACKGROUND

Before 2008, all location and construction of electric transmission lines of a certain size and length was governed by 1995 PA 30, known as the Electric Transmission Line Certification Act, MCL 460.561 *et seq.* (Act 30).[2] In 2008, the Legislature passed 2008 PA 295, known as the Clean, Renewable, and Efficient Energy Act, MCL 460.1001 *et seq.* (Act 295). Part 4 of Act 295, MCL 460.1141 *et seq.*, titled "WIND ENERGY RESOURCE ZONES" (Act 295(4)), included provisions for the creation of a wind energy resource zone board (WERZ Board) that would issue a report determining the regions in the state with the highest wind energy harvest potential. MCL 460.1143; MCL 460.1145. After receiving that report, the

[1] MPPA and MMEA are appellees in Docket No. 303009, but are appellants in Docket No. 303040. Similarly, ABATE is the appellant in Docket No. 303009, but an appellee in Docket No. 303040. However, because these cases are consolidated, these three parties, all of whom were intervenors in the underlying proceedings, only argue appellant positions, despite their status as appellees in the other appeal. For clarity, throughout this opinion, the term "appellants" shall refer to only ABATE, MPPA, and MMEA and the term "appellees" shall refer to only the PSC and ITC.

[2] Specifically, Act 30 required a certificate to be obtained from the PSC before construction was begun on a transmission line "of 5 miles or more in length wholly or partially owned by an electric utility, affiliated transmission company, or independent transmission company through which electricity is transferred at system bulk supply voltage of 345 kilovolts or more," MCL 460.562(g). See MCL 460.565.

electric utilities, affiliated transmission companies, and independent transmission companies with facilities within or adjacent to the regions identified by the state would "identify existing or new transmission infrastructure necessary to deliver maximum and minimum wind energy production potential for each of those regions" and submit that information to the WERZ Board for review. MCL 460.1145(6). On the basis of the WERZ Board's report, the PSC would then designate an area or region of the state that would likely produce the most wind energy as "the primary wind energy resource zone." MCL 460.1147(1). Act 295(4) also allowed electric utilities, affiliated transmission companies, and independent transmission companies to apply for and obtain an "expedited siting certificate." MCL 460.1149, 460.1151, and 460.1153.

The WERZ Board was created on December 4, 2008. In its final report, dated October 15, 2009, the WERZ Board identified four regions in Michigan with the highest wind energy potential. Relevant to this case, Region No. 4, covering Huron, Bay, Saginaw, Sanilac, and Tuscola Counties, had a minimum wind energy generating capacity of 2,367 megawatts (MW) and a maximum of 4,236 MW. Pursuant to MCL 460.1145(6), on November 30, 2009, ITC informed the WERZ Board that

> [s]ignificant backbone transmission system enhancements would be required in [Region 4] due to the fact that the capacity of the transmission facilities in this region is already lower than the Board identified minimum and maximum wind generation capacity levels. Options presented include six 230 kV [kilovolt] high-temperature circuits at an approximate cost of $560 million to support the minimum wind generation capacity level, and eight 230 kV high-temperature circuits or four 345 kV circuits to support the maximum wind generation capacity level at ap-

> proximate costs of $740 million and $510 million respectively. [ITC Michigan Wind Zones Transmission Analysis, November 30, 2009, p 30.]

On January 27, 2010, pursuant to MCL 460.1147(1), the PSC formally accepted the WERZ Board's report and designated Region 4 as the primary wind energy resource zone.

II. UNDERLYING FACTS AND PROCEEDINGS

Pursuant to MCL 460.1149(4), on February 3, 2010, ITC submitted a letter to the PSC notifying it that, within 60 days or as soon as practicable thereafter, ITC intended to seek approval from the Midwest Independent Transmission System Operator, Inc. (MISO) for a transmission line that would enable realization of the wind power in Region 4. The PSC acknowledged receiving the letter and informed ITC that the letter fulfilled the notice requirements of MCL 460.1149(4). MISO ultimately approved ITC's proposed transmission line in August 2010.

On August 30, 2010, ITC filed an application in the PSC requesting an expedited siting certificate authorizing the construction of a transmission line to enable the wind potential of Region 4 to be realized. The proposed transmission line included "a new 345 kV double circuit tower line and four new substations." Along with the application, ITC filed direct testimony and exhibits addressing specific factors required by MCL 460.1151. The referee granted the petitions to intervene of Consumers Energy, Detroit Edison, MMEA, and MPPA, and ABATE was allowed "permissive" intervention by the PSC.

During the proceedings, appellants argued that ITC's proposed transmission line did not meet the requirements of Act 295(4) because (1) it was oversized, was

too costly, and represented an unreasonable threat to the public convenience; (2) Act 295(4) did not provide authorization for construction of a transmission line because that authorization was reserved to Act 30; (3) ITC was still required to undergo the siting process of Act 30; and (4) Act 295(4) was unconstitutional and void because it displaced the siting process of Act 30. However, on February 25, 2011, the PSC issued an order granting ITC's application for an expedited siting certificate and authorizing it to construct the transmission line using the proposed route.[3]

The PSC determined that "ITC's proofs fulfill[ed] all of the statutory requirements" under MCL 460.1153 and concluded that the transmission line was of "appropriate capability" because it met or exceeded the maximum load, noting that the 10 percent requirement for production of electricity with renewable energy was "a floor, not a ceiling." It also concluded that the size of the proposed transmission line was reasonable "in light of the risk that underbuilding the line now could result in substantially higher costs and additional environmental impacts in the future if transmission capacity needed to be added." Finally, regarding authorization for construction, the PSC concluded that resolving the alleged conflict between Act 295(4) and Act 30 "belongs to the [PSC's] judicial superiors," but stated that it was "counterintuitive" that the Legislature intended an *expedited* siting certificate to take 18 months[4] (emphasis added).

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[3] There is neither a proposal for decision nor any exceptions because the PSC agreed to read the record.

[4] The 18-month period referred to consists of the provision in Act 295 for "a maximum of 180 days to grant or deny an expedited siting certificate under this section," MCL 460.1153(6), and the provision in Act 30 that the PSC "shall grant or deny the application for a certificate not later than 1 year after the application's filing date," MCL 460.568(4).

In March 2011, appellants filed their appeals in this Court; the appeals were administratively consolidated. *In re Application of Int'l Transmission Co for Expedited Siting Certificate*, unpublished order of the Court of Appeals, entered March 31, 2011 (Docket Nos. 303009 and 303040). The PSC denied appellants' motion for a stay pending resolution of this appeal.

III. STANDARD OF REVIEW

The standard of review for PSC orders is narrow and well defined. All regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. MCL 462.25; *Great Wolf Lodge of Traverse City, LLC v Pub Serv Comm*, 489 Mich 27, 37-38; 799 NW2d 155 (2011). A party aggrieved by a PSC order bears the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8).

> To declare an order of the [PSC] unlawful there must be a showing that the [PSC] failed to follow some mandatory provision of the statute or was guilty of an abuse of discretion in the exercise of its judgment. The hurdle of unreasonableness is equally high. Within the confines of its jurisdiction, there is a broad range or "zone" of reasonableness within which the PSC may operate. [*In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999) (quotation marks and citation omitted).]

An order is also unreasonable if it is totally unsupported by admissible and admitted evidence. *Associated Truck Lines, Inc v Pub Serv Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966).

A reviewing court gives due deference to the PSC's administrative expertise and may not substitute its judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225

(1999). This Court gives respectful consideration to the PSC's construction of a statute that the PSC is empowered to execute and will not overrule that construction absent cogent reasons. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008). If the language of a statute is vague or obscure, the PSC's construction serves as an aid to determining the legislative intent. *Id.* However, the PSC's interpretation is not binding on this Court and "cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *Id.*

Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

IV. CONSTITUTIONALITY OF ACT 295(4)

At issue in this case is the proper interpretation of Act 295(4) and Act 30. The primary goal of statutory interpretation is to determine the intent of the Legislature. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205; 815 NW2d 412 (2012). The best indicator of that intent is the language of the statute itself. *Id.* at 205-206. The words used by the Legislature and any undefined terms are given their common and ordinary meaning. See *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). This Court presumes that the Legislature intended the meaning clearly expressed in unambiguous statutory language and no further construction is required or allowed. *Id.*

In addition, "[s]tatutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003). Consistently with this mandate, " 'apparently

conflicting statutes should be construed, if possible, to give each full force and effect.' " *In re Midland Publishing Co, Inc*, 420 Mich 148, 163; 362 NW2d 580 (1984), quoting *State Hwy Comm'r v Detroit City Controller*, 331 Mich 337, 358; 49 NW2d 318 (1951).

Appellants first contend that the PSC exceeded its authority by authorizing construction of ITC's transmission line because the expedited siting certificate authorized by Act 295(4) does not authorize actual construction of a transmission line. In addition, having interpreted Act 295(4) to authorize construction, the PSC rendered Act 295(4) unconstitutional because that interpretation created an exception to the requirements of Act 30, thereby violating Const 1963, art 4, § 25, which provides, "No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be reenacted and published at length." There is no question that Act 30 was not reenacted and published at length when Act 295 was passed. Therefore, to determine whether Act 295(4) violates the Constitution, we must decide whether Act 295(4) seeks to revise, alter, or amend Act 30.

A. AUTHORIZATION OF CONSTRUCTION

Under Act 30, "[i]f . . . an independent transmission company plans to construct a major transmission line in this state in the 5 years after planning commences, the . . . independent transmission company *shall* submit a construction plan to the [PSC]." MCL 460.564(1) (emphasis added). There is no dispute that the transmission line for which ITC sought approval was a major transmission line as defined in Act 30. See MCL 460.562(g). MCL 460.565 then provides that "[a]n . . . independent transmission company *shall not begin construction* of a major transmission line for which a plan

has been submitted under [MCL 460.564] until the [PSC] issues a certificate for that transmission line." Both of these provisions use the term "shall," making them mandatory. *Mich Ed Ass'n v Secretary of State* (*On Rehearing*), 489 Mich 194, 218; 801 NW2d 35 (2011). Thus, under Act 30, before beginning construction, ITC was required to submit an application for a certificate of public convenience and necessity.

Appellees argue that ITC was not required to submit an application under Act 30 because the siting certificate under Act 295(4) authorized construction. The parties agree that none of the provisions in Act 295(4) expressly states that construction is authorized by issuance of a siting certificate. The PSC argues that the Legislature's use of the term "siting" to describe the certificate that is granted indicates an intent to authorize construction. Specifically, "site" means "to place in or provide with a site; locate" or "to put in position for operation[.]" *Random House Webster's College Dictionary* (1997). Similarly, "construction" is defined under Act 295(4) as "any substantial action *constituting placement* or erection of the foundations or structures supporting a transmission line." MCL 460.1141(a) (emphasis added). Furthermore, certificates issued under Act 30 are not "siting" certificates but certificates of public convenience and necessity for proposed major transmission lines, MCL 460.562(b), and under Act 295(4), a siting certificate "is conclusive and binding as to the public convenience and necessity for that transmission line . . . ." MCL 460.1153(5). Therefore, interpreting a siting certificate to be a construction certificate would explain why there are separate construction provisions in Act 30 that are not present in Act 295(4) and why each act uses a different type of certificate.

Furthermore, given that "siting" means placement and that "construction" is statutorily defined as "any substantial action constituting placement," construction could be interpreted as a subset of siting. This reading would satisfy the principle of statutory interpretation suggesting that construction and siting have different meanings. See *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n*, 484 Mich 1, 14; 795 NW2d 101 (2009) ("If the Legislature had intended the same meaning . . . it would have used the same word."). Accepting that interpretation, the application process itself is arguably "a substantial action constituting placement" and, therefore, constitutes construction. If that is true, then Act 295(4) necessarily authorizes construction because the very act of applying constitutes construction.

Finally, authorization of construction appears implicit from MCL 460.1157, which provides, "This part does not prohibit an . . . independent transmission company from constructing a transmission line without obtaining an expedited siting certificate." It would be legitimate to interpret the express statement that Act 295(4) does not prohibit construction of transmission lines without obtaining an expedited siting certificate to mean that construction is permitted with an expedited siting certificate. Under that reading, interpreting Act 295(4) not to permit construction would render MCL 460.1157 mere surplusage in violation of the rules of statutory interpretation. See *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006) (holding that courts must "interpret every word, phrase, and clause in a statute to avoid rendering any portion of the statute nugatory or surplusage").

Accordingly, we hold that the PSC's interpretation of Act 295(4) to mean that issuance of an expedited siting

certificate authorizes construction of the transmission line was reasonable. However, this interpretation creates an exception to the mandatory nature of Act 30.

1. SUPREMACY CLAUSE

Appellees argue that Act 295(4) has a supremacy clause that trumps the mandatory nature of Act 30. We disagree. Act 295(4) provides, in relevant part: "If the [PSC] grants an expedited siting certificate for a transmission line under this part, the certificate takes precedence over a conflicting local ordinance, law, rule, regulation, policy, or practice that prohibits or regulates the location or construction of the transmission line." MCL 460.1153(4).

"A general rule of statutory construction is that words or phrases shall be read in context and construed according to the rule of grammar and common usage." *Deur v Newaygo Sheriff*, 420 Mich 440, 445; 362 NW2d 698 (1984) (quotation marks and citation omitted). In MCL 460.1153(4), the context indicates that the term "local" modifies each noun in the phrase. See *Hanselman v Wayne Co Concealed Weapon Licensing Bd*, 419 Mich 168, 180; 351 NW2d 544 (1984) (concluding that an introductory adjective "modifies each and every one of the subsequent units or persons and does not merely modify the word" directly following the adjective). This interpretation is also consistent with Act 30, which not only contains identical language in MCL 460.570 but also provides, "This act shall control in any conflict between this act and any other law of this state." MCL 460.563(2). If the language of MCL 460.1153(3) in Act 295(4) were actually a supremacy clause, MCL 460.563(2) would have been unnecessary in Act 30 because MCL 460.570 would have already covered that issue. Thus, MCL 460.1153(3) is

not a supremacy clause that trumps Act 30. Rather, it is Act 30 that "controls" any conflict.

2. THE MORE-SPECIFIC, LATER-ENACTED STATUTE RULE

Appellees also assert that Act 295(4) controls over Act 30 because it is the more specific and more recently enacted statute. The rule is that "a later-enacted specific statute operates as an exception or a qualification to a more general prior statute covering the same subject matter and . . . if there is an irreconcilable conflict between two statutes, the later-enacted one will control." *In re Midland Publishing Co*, 420 Mich at 163. Although we agree with appellees that Act 295(4) is both more specific and the more recently enacted statute, we hold that the rule is inapplicable in this case because Act 30 explicitly states that it "shall control" in any conflict. MCL 460.563(2). Accordingly, unless and until its supremacy clause is amended, Act 30 controls regardless of whether more specific, later-enacted statutes are passed.

We conclude, then, that because Act 295(4) implicitly permits construction of wind energy transmission lines without undergoing the process in Act 30, Act 295(4) creates an exception to the mandatory nature of Act 30. Therefore, Act 295(4) revises, alters, or amends Act 30 in violation of Const 1963, art 4, § 25.

B. EXCEPTION TO REENACTMENT AND PUBLICATION REQUIREMENTS

The parties agree that amendment by implication is an exception to Const 1963, art 4, § 25. See *Alan v Wayne Co*, 388 Mich 210; 200 NW2d 628 (1972); *Nalbandian v Progressive Mich Ins Co*, 267 Mich App 7; 703 NW2d 474 (2005). The exception was first recognized in *People v Mahaney*, 13 Mich 481, 496 (1865). *Alan*, 388

Mich at 270; *Nalbandian*, 267 Mich App at 12. The *Mahaney* Court determined that the act it was considering "does not assume in terms, to revise, alter or amend any prior act, or section of an act, but by various transfers of duties it has an amendatory effect by implication . . . ." *Mahaney*, 13 Mich at 496; see also *Alan*, 388 Mich at 276-277. It continued:

> An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent. [*Mahaney*, 13 Mich at 497.]

Thus, an act complete in itself will not be found to violate Const 1963, art 4, § 25. See also *Alan*, 388 Mich at 277; *Nalbandian*, 267 Mich App at 14-15.

The *Alan* Court then adopted Justice POTTER's dissent in *People v Stimer*, 248 Mich 272, 293; 226 NW 899 (1929), for the manner in which the determination of whether an act was complete in itself would be made:

> The character of an act, whether amendatory or complete in itself, is to be determined not by its title, alone, nor by the question whether it professes to be an amendment of existing laws, but by comparison of its provisions with prior laws left in force, and if it is complete on the subject with which it deals it will not be subject to the constitutional objection, but if it attempts to amend the old law by intermingling new and different provisions with the old ones or by adding new provisions, the law on that subject must be regarded as amendatory of the old law and the law amended must be inserted at length in the new act. [*Alan*, 388 Mich at 278-279 (quotation marks and citations omitted; emphasis deleted).]

Thus, "[i]f a bill under consideration is intended whether directly or indirectly to *revise, alter, or amend* the operation of previous statutes, then the constitution, unless and until appropriately amended, requires that the Legislature do in fact what it intends to do by operation." *Id.* at 285. However,

> [w]hat we say in no way affects those limited kinds of cases where because of a special fact situation a court is faced with two accidently absolutely conflicting statutes requiring a determination that one or the other applies (and thus an amendment or repeal of the other by implication follows in the fact circumstances). These kinds of cases do not result from any deliberate misleading by the Legislature or failure to make all reasonable efforts to make clear in the statutes what is intended, but rather . . . "[i]t is probable that if the requirement has at any time been disregarded by the legislature, the default has proceeded from inadvertence merely." [*Id.* at 285-286, quoting *Mok v Detroit Bldg & Savings Ass'n*, 30 Mich 511, 517 (1875).]

Accordingly, even though Act 295(4) violates the reenactment and publication requirements of Const 1963, art 4, § 25, the act is not unconstitutional if the conflict is accidental or the act meets the requirements of being an act complete in itself.

1. ACCIDENTAL OR INADVERTENT

From an examination of Act 295(4), it does not appear that the conflict between Act 30 and Act 295(4) was accidental or inadvertent. Rather, Act 295(4) "quite clearly resulted from a legislative knowledge of Act 30 and an intent to abrogate that rule with respect to" specific wind energy transmission lines. *Nalbandian*, 267 Mich App at 14. Indeed, the definitions applicable to Act 295 include explicit references to and adopt definitions from Act 30. See MCL 460.1003(d); MCL 460.1007(c). The conflict between Act 295(4) and Act 30

was not the result of " 'inadvertence merely,' " but a "failure to make all reasonable efforts to make clear in the statutes what [was] intended . . . ." *Alan*, 388 Mich at 286 (citation omitted). Because the Legislature intended to amend Act 30, it was required to comply with the "plain and unequivocal requirements of . . . Const 1963, art 4, § 25." *Id.* at 275.

Appellees' reliance on *Alan*, 388 Mich at 282, to argue that reenactment and publication was unnecessary because it would have been absurd and unduly burdensome is similarly unavailing. Appellees rely on the following quote from *Alan*:

> " 'If, whenever a new statute is passed, it is necessary that all prior statutes, modified by it by implication should be re-enacted and published at length as modified, then a large portion of the whole code of laws of the State would require to be re-published at every session, and parts of it several times over, until, from mere immensity of material, it would be impossible to tell what the law was.' " *Stimer*, [248 Mich at] 279, quoting *Mahaney*, [13 Mich at] 497. [*Id.*]

However, the very next paragraph in *Alan* refuted this position and, in fact, adopted the position of the dissent in *Stimer*. *Alan*, 388 Mich at 282-283. The Supreme Court then went on to note "further reasons why the objection that it will be hard work to comply with the constitution is not well taken," including technological advances in printing and copying and the Legislature's "own sophisticated bill drafting and research services . . . ." *Id.* at 283-284.

2. COMPLETE IN ITSELF

We also hold that Act 295 is not complete in itself. Comparing its provisions with the prior laws left in force, i.e. Act 30, Act 295 is not "complete on the subject with which it deals[.]" *Alan*, 388 Mich at 279 (quotation

marks and citations omitted). Appellees contend that Act 295(4) is complete on the subject with which it deals because it only deals with transmission lines for electricity generated by wind energy conversion. Appellants argue that Act 295(4) deals with transmission lines and, because transmission lines are already addressed under Act 30, Act 295(4) is simply an amendment of Act 30. Both of these arguments miss the mark because they have limited their focus to Act 295(4). The relevant inquiry is whether the act, i.e. Act 295 in its entirety, is complete in itself.

Nevertheless, even if the focus is limited to Act 295(4) and its purpose is defined as appellees argue, the act is still not complete by its own terms because Act 295(4) is optional. Act 295(4) provides that construction of transmission lines is not precluded without an expedited siting certificate. MCL 460.1157. That means there is a mechanism other than Act 295(4) for permitting construction of transmission lines. Indeed, companies can use Act 30 to construct transmission lines, even for those delivering electricity from wind energy conversion. Thus, Act 295(4) does not even comprehensively address that limited subset of transmission lines, let alone all transmission lines. Consequently, Act 295 cannot be an act complete in itself, rendering any provisions that amend Act 30 a violation of Const 1963, art 4, § 25. *Nalbandian*, 267 Mich App at 15-16.[5]

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[5] Appellees rely on *People v Cavaiani*, 172 Mich App 706; 432 NW2d 409 (1988), *Meridian Charter Twp v East Lansing*, 101 Mich App 805; 300 NW2d 703 (1980), and *Eyde v Lansing Charter Twp*, 79 Mich App 358; 261 NW2d 321 (1977), to support their argument that Act 295 is complete within itself. However, these cases are not binding on this Court, but *Nalbandian* is. MCR 7.215(J)(1). Thus, to the extent that those cases would permit a different conclusion, this Court is bound to follow *Nalbandian*, which implicitly rejected those cases. See *Nalbandian*, 267 Mich App at 11 n 3.

3. ABSURD-RESULTS RULE

Appellants suggest that the Legislature intended to require companies proceeding under Act 295(4) to also comply with the provisions of Act 30. However, "the so-called 'absurd-results rule' applies in Michigan." *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 664; 760 NW2d 565 (2008). "[A] statute should be construed to avoid absurd results that are manifestly inconsistent with the legislative intent . . . ." *Id.* at 674 (quotation marks and citations omitted). Put another way, "a statute need not be applied literally if no reasonable lawmaker could have conceived of the ensuing result." *Id.* at 675. Considering Act 295 in its entirety, we conclude that it was intended to issue certificates to companies that would permit them to begin construction on transmission lines to harness wind energy in an expedited manner, so that companies could meet their renewable energy requirements by the 2015 deadline. See MCL 460.1027.

The interpretation suggested by appellants, that a company must still comply with Act 30 after completing the process under Act 295(4), eliminates any benefit for proceeding under Act 295(4) and results in the "expedited" process taking up to 18 months, while the traditional process takes 12 months at the most. Appellants assert that the process is not necessarily longer because the two processes can be implemented simultaneously, or the Act 30 process could be started first. However, there is no logical reason why a company would ever use Act 295(4) if Act 30 is still required. Act 30 permits construction once a certificate of public convenience and necessity has been obtained, MCL 460.565, but a siting certificate under Act 295 "is conclusive and binding as to the public convenience and necessity for that transmission

line . . . ." MCL 460.1153(5). Thus, having to comply with both Act 295(4) and Act 30 wastes the time and money of both the applicant company and the PSC and provides nothing of value to either the company or the public that cannot be achieved by moving forward solely under Act 30. Rather, the result of each process is a certificate regarding public convenience and necessity, only one of which actually permits construction. Accordingly, even if the process could be structured so that compliance with both acts did not take any longer than simply moving forward under Act 30, Act 295(4) would still be rendered superfluous because no company would ever use it. Therefore, we conclude that the interpretation suggested by appellants constitutes an absurd result that is manifestly inconsistent with the legislative intent. The absurd-results rule, however, cannot render an unconstitutional act constitutional. Rather, it will simply prevent the absurd result.

C. A HARMONIOUS INTERPRETATION

Thus, although we conclude that the PSC's interpretation of Act 295(4) to permit construction with the issuance of an expedited siting certificate was both reasonable and consistent with the legislative intent, that interpretation creates an exception to the mandatory provisions in Act 30 in violation of Const 1963, art 4, § 25. Furthermore, this Court is obligated, when possible, to construe apparently conflicting statutes in a manner that gives each statute full force and effect, *In re Midland Publishing Co*, 420 Mich at 163, and to do so in a manner that does not render either statute unconstitutional, *Taylor*, 468 Mich at 6.

There is an interpretation of Act 295 and Act 30 that would give each full force and effect without violating the Constitution: A company that obtains a siting

certificate under Act 295 must also obtain a certificate of public convenience and necessity under Act 30 before beginning construction. Even though this interpretation appears contrary to the legislative intent and violates the absurd-results rule, neither of these doctrines can render an unconstitutional provision constitutional. The only way to interpret the statutes harmoniously without rendering Act 295 unconstitutional is to conclude that, regardless of whether a siting certificate is obtained under Act 295, Act 30 mandates compliance with its provisions (relating to public convenience and necessity) before construction can commence. Accordingly, we so hold.

V. PROSPECTIVE APPLICATION

Having concluded that there is only one interpretation of Act 295(4) that renders it constitutional, we are, nevertheless, mindful of the effect of our decision. There is no question in our minds that the Legislature did not intend this result, but correcting the unintended result rests with the Legislature. Even so, after taking into account all the circumstances confronting this Court, we conclude that our decision should have only prospective application.

"Although the general rule is that judicial decisions are given full retroactive effect, a more flexible approach is warranted where injustice might result from full retroactivity." *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002) (citations omitted). The threshold question is "whether the decision clearly established a new principle of law." *Id.* at 696. If so, there are three factors to be considered in determining whether a decision should not have retroactive application: "(1) the purpose to be served by the

new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Id.*

Although this opinion interprets Act 295(4) in the only manner possible without rendering it unconstitutional, because that result is both absurd and clearly contrary to the intent of the Legislature, "our holding is akin to the announcement of a new rule of law," particularly given the erroneous, albeit reasonable, interpretation adopted by the PSC. *Id.* Having passed the threshold question, application of the three-part test is appropriate and leads us to conclude that prospective application is appropriate here.

First, the purpose of the new rule is to correct an error in the interpretation of Act 295(4) in order to prevent it from being rendered unconstitutional. We believe this purpose would best be furthered by applying it only to applications made under Act 295(4) after this opinion's date. See *id*. at 697; *Riley v Northland Geriatric Ctr* (*After Remand*), 431 Mich 632, 646; 433 NW2d 787 (1988) (opinion by GRIFFIN, J.).

Second, we take into account that ITC and unknown other companies relied on the reasonable assumption, and the PSC's ruling, that construction was authorized under Act 295(4) without also having to comply with the requirements of Act 30. Indeed, ITC has already invested at least $110 million in constructing this project in accordance with the PSC's order, which is prima facie lawful and reasonable. See MCL 462.25; *Great Wolf Lodge*, 489 Mich at 37-38. Monopoles have been placed, wires strung, and substations built and dedicated. Prospective-only application recognizes that these actions were taken in reliance on that interpretation.

Third, prospective application minimizes the effect of this decision on the administration of justice. Retroactive application could result in additional litigation as the parties attempt to determine whether ITC's completed construction can remain and whether ongoing construction must be stopped. Prospective application eliminates these uncertainties as well as prevents tying up PSC resources on duplicative reconsideration of evidence under Act 30 in cases that have already been thoroughly considered under Act 295(4) and in which construction has already begun. In addition, it provides the Legislature the opportunity to fix the absurd result created by this required interpretation without placing the energy companies at a disadvantage by stopping the ongoing construction of transmission lines that are necessary to help them meet the 2015 deadline for green energy mandates while time and money are spent on duplicative efforts under Act 30.

Accordingly, this decision shall have immediate effect pursuant to MCR 7.215(F)(2) and shall apply only to applications brought under Act 295(4) on or after the date of this opinion.

VI. APPROPRIATE CAPABILITY

Appellants also assert that the PSC erroneously concluded that the transmission line proposed by ITC was of an "appropriate capability" as required by MCL 460.1153(3)(d), which provides, "The proposed transmission line will be of appropriate capability to enable the wind potential of the wind energy resource zone to be realized." The PSC stated:

> Region 4 wind production capability was estimated on the record at between 2,367 MW and 4,236 MW. 3Tr. 466. The proposed transmission line will have a 5,000 MW capacity. The [PSC] finds that the proposed transmission

> line will be of the appropriate capability to enable the wind potential of the wind energy resource zone to be realized. It is axiomatic that a planned transmission line should not be built to a size that may become overloaded. Further, building to a minimum load is wasteful and results in duplicative efforts (and costs) due to piecemeal construction.
>
> It is undisputed that the Thumb Region has the greatest potential for the development of wind farms. There is also no dispute that the current transmission capability in the Thumb Region is not sufficient to move much more electric power to market. There is unrebutted testimony on the record to the effect that the current transmission system is at or near capacity at this time and failure to add additional transmission capacity will frustrate the Legislature's direction for the [PSC] to facilitate the development of wind power in this state.
>
> Contrary to the assertions of ABATE and MPPA and MMEA[,] the requirement in Section 27 of Act 295 [MCL 460.1027] does not require electric providers to generate 10% of the electric requirement by 2015 via renewable energy, but to generate "not less" than 10% of their needs by 2015 through use of renewable resources, such as wind power. Thus, the limitation on renewable energy systems in [MCL 460.1027] is a floor, not a ceiling.

We conclude that the PSC's interpretation is consistent with the language of MCL 460.1153(3)(d). Contrary to appellants' positions, the PSC did not equate "appropriate capability" with maximum. Indeed, because ITC's proposed transmission line has a 5,000 MW capacity, it exceeds the maximum estimate. The PSC also explained that preventing duplicative efforts and costs from piecemeal construction and not building to a size that could become overloaded were considerations for determining what capability was appropriate.

ABATE argues that the PSC erred by declining to determine that appropriate capability means the mini-

mum capacity, not the maximum capacity. However, this contention is at odds with ABATE's own reasoning. If it is erroneous for the PSC to read "maximum" into the statute, then it is equally erroneous for it to read "minimum" into the statute. Furthermore, interpreting the "appropriate capability" to be the minimum wind potential is contrary to MCL 460.1153(3)(d), which requires the line "to enable the wind potential of the wind energy resource zone to be realized." Because the wind potential in Region 4 is a range that goes significantly higher than the minimum, a transmission line built only to handle the minimum wind potential would not enable the wind *potential* to be realized, only some wind *capability*. Notably, the minimum and maximum numbers were simply estimates. Thus, there is at least some possibility that *more* power could be generated. Therefore, the PSC's decision to require the capacity to be greater than the estimated maximum makes sense.

MPPA and MMEA argue that "wind potential" means the amount of wind power reasonably expected to be realized. However, this definition inserts language into the statute that is not there. MCL 460.1153(3)(d) requires an appropriate capacity for "the wind potential [of Region 4] to be realized." MPPA and MMEA attempt to insert a reasonability requirement that does not exist and then attempt to define what would be reasonable. Again, the statute does not authorize a transmission line that will realize some, most, or even a reasonably anticipated amount of wind potential. It says the line must be capable of enabling the realization of *the* wind potential. Any number less than the maximum estimated capacity arguably fails to meet this standard.

Finally, appellants' argument that the capacity is too large because it exceeds the 10 percent renewable energy standard is meritless. Appellants have ignored

the PSC's basis for rejecting that argument—that the 10 percent figure represents a floor, not a ceiling. Indeed, MCL 460.1027(1) explicitly provides that companies meeting or exceeding certain size thresholds "shall achieve a renewable energy capacity portfolio of not less than" the specified amounts. Thus, the fact that ITC's transmission line would exceed the 10 percent requirement is in keeping with the Legislature's mandate of a 10 percent minimum.

Accordingly, appellants have failed to provide a cogent reason to overrule the PSC's construction of "appropriate capability."[6]

VII. FEASIBLE AND REASONABLE ROUTE

Finally, ABATE argues that the PSC's conclusion that the route was both feasible and reasonable was erroneous because a letter from the Department of Agriculture indicated disagreement with ITC's position that the transmission lines would have no impact on land that was enrolled in the state's farmland preservation program and because they were concerned that property in the transmission line route might "be acquired via some other property interest other than an easement." We decline to consider this issue because it is unpreserved and abandoned.

ABATE not only never argued before the PSC about the specific letter from the Department of Agriculture, but it never argued any grounds to the PSC for concluding that the route was not feasible or reasonable. In addition, there is no evidence that the PSC even con-

[6] Because the PSC appropriately interpreted the term, there is no reason to consider whether the evidence supports its decision. Appellants' arguments are premised on the interpretation being erroneous. None of them argued that the PSC's decision was still erroneous even if its interpretation was proper.

sidered the letter on which ABATE rests its argument. The letter was not marked as received by the PSC until February 1, 2011, long after the December 1, 2010, close of the evidentiary record and only 24 days before the PSC issued its order. Finally, ABATE has not cited a single legal authority for its argument. "A party may not simply announce its position and then leave it to this Court to discover and rationalize the basis for its claims. Furthermore, a party may not give an issue cursory treatment with little or no citation of supporting authority." *In re Application of Ind Mich Power Co*, 275 Mich App 369, 376; 738 NW2d 289 (2007) (citations omitted). Accordingly, this issue has been abandoned. *Id.*, citing *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

VIII. CONCLUSION

We hold that the PSC properly issued the siting certificate to ITC, but that it erroneously concluded that construction was authorized by the certificate. The only way to interpret Act 295 harmoniously with Act 30 that does not render Act 295 unconstitutional is to conclude that, regardless of whether a siting certificate is obtained under Act 295, Act 30 mandates compliance with its provisions before construction can commence. Nevertheless, after consideration of the effects of this decision, we hold that this decision is limited to prospective application. Therefore, we affirm the result of the PSC's order in this case.

FITZGERALD, P.J., and METER and BOONSTRA, JJ., concurred.

DISCOUNT TIRE CO v DEPARTMENT OF TREASURY

Docket No. 307038. Submitted October 5, 2012, at Detroit. Decided November 6, 2012, at 9:05 a.m. Leave to appeal sought.

Petitioner, Discount Tire Co., a Michigan corporation engaged in the business of tire sales and repairs, appealed in the Court of Claims a decision and order of respondent, the Department of Treasury, that denied petitioner's request for a refund of use taxes remitted to respondent when petitioner replaced certain tires returned by its retail customers. When petitioner sold a tire to a customer, the customer had the option of purchasing, at extra cost, a certificate for the repair, refund, or replacement of the tire. Pursuant to the certificate, if a tire covered by the certificate was damaged within three years of its purchase and the tire still had a stated depth of tread remaining, the tire would be repaired by petitioner at no cost. If the tire was irreparably damaged, the customer was entitled to a full cash refund equal to the purchase price and sales tax paid on the tire. The customer then had the option to take the entire refund, spend part of it on a tire of lesser value and keep the rest, spend all of it on a tire of greater value and pay the difference, spend all or part of it on goods and services offered by petitioner, or use it to acquire a tire of comparable value to the original tire for the price paid for the original tire. If petitioner sold a replacement tire, petitioner collected sales tax and remitted it to respondent. Petitioner also remitted to respondent use tax on the replacement tire. Respondent had concluded that petitioner was not permitted to claim a sales tax credit on the return of irreparably damaged tires because the return provided for in the certificate was not a "return of goods" under § 6b of the General Sales Tax Act, MCL 205.56b, as defined by respondent's relevant administrative rule, Mich Admin Code, R 205.16 (Rule 16). Respondent concluded that the replacement tires were provided for free and not sold at retail and, therefore, petitioner was required to pay use tax on the replacement tires and was not entitled to a refund of that tax. The parties sought summary disposition in the Court of Claims. The court, William E. Collette, J., granted petitioner's motion and denied respondent's motion, holding that Rule 16 was invalid because of its improperly restrictive definition of "returned goods," that petitioner was entitled to claim a

returned-goods sales tax credit on the original tire sale, and that the replacement tire was sold at retail, making the application of the use tax to that tire inappropriate. The court also held that petitioner would be entitled to a returned-goods sales tax credit even under the restrictive definition of "returned goods" in Rule 16. Respondent appealed.

The Court of Appeals *held*:

1. When a person returns goods, the goods revert to their former owner. Petitioner was entitled under MCL 205.56b to a credit for the sales tax it had remitted to respondent at the time of the original sale that was refunded to a customer who returned an irreparable tire under the terms of the certificate.

2. Any rule that an administrative agency issues without exercising delegated legislative power is an interpretive rule. Interpretive rules interpret and apply the provisions of a statute under which the agency operates. Interpretive rules are invalid if they do more than specify the application of a legislative purpose implicit in the general language used by the Legislature, if they conflict with the governing statute, if they extend or modify the statute, or if they have no reasonable relationship to a statutory purpose.

3. Rule 16 is an interpretive rule that changes the scope of, modifies, and narrows the returned-goods credit stated in MCL 205.56b. The rule contains far more restrictive language than MCL 205.56b and is therefore invalid as a matter of law.

4. In any event, petitioner met the requirements of Rule 16 under the facts of this case.

5. Because the replacement tires were purchased with the money refunded by petitioner, they are retail goods as well and are subject to sales tax, but not use tax. The use tax is complementary to the sales tax and the two taxes cannot be imposed on the same transaction because the use tax does not apply to goods sold at retail. The sales tax applies to both sales transactions involved in this matter and the use tax applies to neither. Petitioner is entitled to the return of use taxes remitted to respondent for the replacement tires.

Affirmed.

1. ADMINISTRATIVE LAW — RULEMAKING — INTERPRETIVE RULES.

Any rule that an administrative agency issues without exercising delegated legislative power is an interpretive rule; interpretive rules interpret and apply the provisions of a statute under which the agency in question operates and are invalid if they do more

than specify the application of a legislative purpose implicit in the general language used by the Legislature, if they conflict with the governing statute, if they extend or modify the statute, or if they have no reasonable relationship to a statutory purpose.

2. ADMINISTRATIVE LAW — TAXATION — GENERAL SALES TAX ACT — RETURNED GOODS CREDIT OR REFUND.

Mich Admin Code, R 205.16 was issued as an interpretive rule by the Department of Treasury to clarify the meaning of the term "returned goods" in § 6b of the General Sales Tax Act, which provides that a taxpayer may claim a credit or refund for returned goods; Rule 16 changes the scope of, modifies, and narrows the returned-goods credit provided for in § 6b and contains far more restrictive language and is thus not a valid interpretive rule (MCL 205.56b).

3. TAXATION — SALES TAX — RETURNED GOODS.

A six percent sales tax is imposed under the General Sales Tax Act on the gross proceeds of all persons engaged in the business of making sales at retail by which ownership of tangible personal property is transferred for consideration; a taxpayer may claim a credit or refund of sales tax for returned goods (MCL 205.52[1]; MCL 205.56b).

4. TAXATION — SALES TAX — USE TAX — RETAIL SALE OF GOODS.

The use tax does not apply to goods sold at retail; the sales tax applies to goods sold at retail; the use tax is complementary to the sales tax, and the two taxes cannot be imposed on the same transaction (MCL 205.51 *et seq*.; MCL 205.91 *et seq*.).

Miller, Canfield, Paddock & Stone, PLC (by *Joanne B. Faycurry* and *Samuel J. McKim, III*), for petitioner.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Scott L. Damich* and *Zachary C. Larsen*, Assistant Attorneys General, for respondent.

Before: K. F. KELLY, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM. Respondent appeals as of right the Court of Claims order granting summary disposition in favor of petitioner in this tax matter. We affirm.

Petitioner is a Michigan corporation engaged in the business of tire sales and repairs in Michigan and elsewhere. When petitioner sells a tire to a customer, the customer has the option of purchasing a "Certificate for Repair, Refund, or Replacement" at an extra cost. Pursuant to the certificate, if a tire covered by the certificate is damaged within three years of purchase and the tire still has a stated depth of tread remaining, the customer is entitled to have the damaged tire repaired at no cost by petitioner. In the event the tire is irreparably damaged, the customer is entitled to a full cash refund equal to the purchase price and sales tax paid on the tire. Additionally, at the customer's request, petitioner must provide the customer the opportunity to purchase a comparable replacement tire at a price not exceeding the purchase price of the original tire.

During the tax years at issue (2003-2006), petitioner charged and remitted sales tax to respondent on each original tire sale, but claimed a credit on that remitted sales tax in the event that the tire was returned as irreparably damaged under the certificate. If petitioner sold a replacement tire to the customer pursuant to the certificate, petitioner collected and remitted sales tax to respondent on the replacement tire and also remitted use tax on the replacement tire. In 2007, petitioner requested from respondent a refund of the use taxes remitted on these replacement tires on the ground that petitioner had paid both sales tax and use tax on those tires. Following an audit, respondent denied petitioner's request.

Petitioner then requested an informal conference with respondent, following which respondent issued an informal conference recommendation supporting respondent's decision to deny petitioner's request. The informal conference recommendation concluded that

petitioner was not permitted to claim a sales tax credit on the return of the irreparably damaged tires because the return provided for in the certificate was not a "return of goods" under the General Sales Tax Act, MCL 205.51 *et seq*., as defined by respondent's administrative Rule 16, Mich Admin Code, R 205.16. Further, the recommendation concluded that the replacement tires were provided for free and not sold at retail and that petitioner was, therefore, required to pay use tax on the replacement tire and was not entitled to a refund of that tax. Respondent officially adopted the conclusions of the informal conference recommendation in a January 27, 2010, decision and order of determination denying petitioner the refund it had requested.

Following respondent's decision, petitioner appealed in the Michigan Court of Claims, and both parties submitted motions for summary disposition. In its October 12, 2011, opinion, the court held that respondent's Rule 16 was invalid because of its improperly restrictive definition of "returned goods," that petitioner was entitled to claim a returned-goods sales tax credit on an original tire sale, and that the replacement tire was sold at retail, making the application of a use tax to that tire inappropriate. The court also held that petitioner would be entitled to the returned-goods sales tax credit even under the restrictive definition of "returned goods" found in Rule 16. Accordingly, the court granted petitioner's motion for summary disposition and denied respondent's motion for summary disposition. This appeal followed.

This Court reviews de novo questions of statutory interpretation. *Wexford Med Group v City of Cadillac*, 474 Mich 192, 202; 713 NW2d 734 (2006). A lower court's decision on a motion for summary disposition is also reviewed de novo. *Maiden v Rozwood*, 461 Mich 109,

118; 597 NW2d 817 (1999). Under MCR 2.116(C)(10), "[s]ummary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

On appeal, respondent first argues that petitioner was not entitled to a returned-goods sales tax credit when replacing a customer's tire pursuant to the certificate. We disagree.

Michigan imposes a six percent sales tax on the gross proceeds of "all persons engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration . . . ." MCL 205.52(1). MCL 205.56b provides that with respect to such sales tax, "[a] taxpayer may claim a credit or refund for returned goods . . . ."

As acknowledged by respondent, the statutory language at issue is sparse. Our goal in statutory construction, however, is, as always, to give effect to the Legislature's intent. *McCormick v Carrier*, 487 Mich 180, 191; 795 NW2d 517 (2010).

> This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted. When reviewing a statute, all non-technical words and phrases shall be construed and understood according to the common and approved usage of the language, MCL 8.3a, and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal. [*Id*. at 191-192](citations and quotation marks omitted).

With these parameters in mind, we do not agree with respondent's contention that the most reasonable con-

struction of the phrase "returned goods" in MCL 205.56b is that the goods must be returned within a certain time frame and be in substantially the same condition as when they were sold. This "reasonable construction" would require us to take a relatively simple, straightforward, and short statute and add several, much more meaningful and elaborate phrases that, had the Legislature intended for them to appear, it could easily have included.

It is undisputed that petitioner engaged in the retail sale of tires, that it charged customers a six percent sales tax on the original tires at issue, and that it remitted that tax to respondent. When those customers who had purchased certificates presented petitioner an original tire that was deemed irreparable, they returned the original tire to petitioner. When one "returns" a good, one reverts it to a former owner. See *The American Heritage Dictionary of the English Language* (4th ed). That is precisely what occurred in this matter. And upon the return of an irreparable tire to petitioner, petitioner provided the customer with a full cash refund, including the sales tax. The customer was free to simply take this refund, spend part of it on a tire of lesser value, put all of it toward a tire of greater value, put some or all of it toward other automotive goods and services offered by petitioner, or use it to acquire a tire of comparable value to the original tire for the price paid for the original tire. In short, the customer received a cash refund that could be used in any manner that the customer chose. Petitioner is thus entitled to a credit for the previously remitted sales tax under MCL 205.56b.

While respondent concentrates heavily on petitioner's obligation under the certificate to provide the customer with the option of purchasing a comparable

tire for the full value of the refund, this is but one possible use of the refund. Under respondent's interpretation, petitioner would be unable to obtain a refund or credit for sales tax remitted to respondent in cases in which petitioner refunded the customer's money and the customer merely walked out the door with the refunded cash. Such a result is both contrary to the plain language of MCL 205.56b and to the underlying purpose of the sales tax.

Respondent next asserts that the trial court erred by not treating respondent's administrative Rule 16 as a valid legislative rule. According to respondent, had the court properly applied the rule, the only reasonable interpretation of MCL 205.56b would preclude petitioner from obtaining a refund under the returned-goods credit. We disagree.

Respondent issued Rule 16 to clarify the meaning of "returned goods" under the General Sales Tax Act. The rule provides, in relevant part, as follows:

> (1) Credits or refunds for returned goods, the sales of which have been subject to tax, may be deducted only if the goods are voluntarily returned for full exchange, an entire refund of purchase price, or full credit. When the property is returned within a reasonable time after the date of sale, and the purchase [sic] is made whole, a credit may be had on the tax paid on the rescinded sale. [Mich Admin Code, R 205.16.]

Rules adopted by an agency in accordance with the Administrative Procedures Act, MCL 24.201 *et seq*., generally have the force and effect of law. *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 239; 501 NW2d 88 (1993). These so-called "legislative rules" are invalid, however, if the agency that enacts them lacks statutory authority to enact such rules, the rules are enacted through improper procedure, or the rules are unreason-

able. *Id*. at 240. Any rule an agency issues without exercising delegated legislative power is an "interpretive rule." *Id*. at 239. Such rules interpret and apply the provisions of a statute under which the agency in question operates and are invalid "if they do more than specify the application of a legislative purpose implicit in the general language used by the legislature, if they conflict with the governing statute, if they extend or modify the statute, or if they have no reasonable relationship to a statutory purpose." *Id*. at 240-241; 243 n 26.

No statute authorizes respondent to enact a definition of "returned goods" that carries the force and effect of law. As such, Rule 16 is not a valid legislative rule. Further, while Rule 16 can properly be construed as an interpretive rule because it states respondent's interpretation of a statute, Rule 16 also changes the scope of, modifies, and narrows the returned-goods credit in the General Sales Tax Act. Even a cursory reading of Rule 16 shows the fact that it contains far more restrictive language than MCL 205.56b. As such, it is invalid as a matter of law. *Id*.

In any event, even if we were to find that Rule 16 is a valid legislative rule, petitioner has met the requirements. First, the tires were voluntarily returned to petitioner upon being irreparably damaged. True, there was damage to the tires, but just as in instances where a person receives a gift and does not like it or buys an item that was defective from the beginning and returns it, the tires were nonetheless voluntarily returned instead of being retained by the customer. In each instance, an outside influence or effect led to the return of the items, but nothing forced the customer to return it.

Second, the tires were returned for a full refund or credit. Respondent has not argued otherwise. Finally,

while difficult to gauge, it could be argued that the tires were returned within a "reasonable time" after the date of sale. There is no indication of the time within which most of the tires were returned. However, for items that are intended to last many years, a reasonable time in which to return the items may indeed be within three years. The period for tires would certainly be different than the period for a pair of soccer cleats for an 8-year-old child. Because respondent did not further define this entirely subjective phrase in its rule and there is no indication when the tires at issue were returned, we cannot say that petitioner failed to meet the requirements of this rule.

Respondent next contends that because petitioner is not entitled to a credit for returned goods under MCL 205.56b, the use tax imposed on any replacement tire provided is not duplicative. We disagree.

As indicated already in this opinion, petitioner is entitled to a credit for returned goods. Moreover, because the replacement tires that were purchased were purchased with the refunded money, they are retail goods as well and subject to sales tax, but not use tax. The use tax is complementary to the sales tax, and the two taxes cannot be imposed on the same transaction because the use tax does not apply to goods sold at retail. *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 237; 644 NW2d 734 (2002); MCL 205.94(1)(c)(*i*). Because the sales tax applies to goods sold at retail, the sales tax applies to both transactions under the certificate, and the use tax applies to neither. In sum, because petitioner was entitled to a sales tax credit for returned goods on the original tires and the replacement tires were sold at retail, petitioner is entitled to a return of the use taxes remitted to respondent for the replacement tires. While respondent complains that this re-

sults in petitioner only remitting sales tax for one tire after the application of the returned-goods sales tax credit, that is precisely what the tax credit allows when a customer returns a good for a cash refund that is used to purchase another good at retail.

Affirmed.

K.F. KELLY, P.J., and MARKEY and SERVITTO, JJ., concurred.

WILSON v KING

Docket No. 305468. Submitted October 10, 2012, at Detroit. Decided November 6, 2012, at 9:10 a.m. Leave to appeal denied, 493 Mich 955.

Marquita Wilson, the mother and next friend of Mac Sconi filed an action in the Wayne Circuit Court against Diane King, seeking visitation rights with Mac's biological siblings under the Child Custody Act, MCL 722.21 *et seq*. Wilson's parental rights to three other children were terminated in 2008, and those children were subsequently adopted by defendant. According to Wilson, defendant initially allowed Mac to visit with his biological siblings, but later prohibited the visitation. Wilson moved for entry of a default judgment when defendant failed to respond to her complaint within 21 days of service. At a hearing at which both parties were present, the court, Megan Maher Brennan, J., denied Wilson's motion and sua sponte dismissed her lawsuit on the basis that Michigan law does not recognize a cause of action for sibling visitation. Wilson appealed.

The Court of Appeals *held*:

1. Pursuant to MCL 710.60(1), after the entry of an adoption order, the person or persons adopting the adoptee become the parent or parents of the adoptee under the law as though the adopted person had been born to the adopting parents, and the adopting parents are liable for all the duties and entitled to all the rights of parents. The statute effectively makes the adopted child the natural child of the adopting parents and the adopting parents the natural parents of the child. The Michigan adoption scheme expresses a policy of severing at law the prior, natural family relationship and creating a new and complete substitute relationship after adoption.

2. Defendant legally adopted Mac's three older biological siblings, and the adoption legally severed the three children's prior, natural family relationship, including their sibling relationship with Mac, and created a new and complete substitute relationship. Even if a cause of action to obtain sibling visitation existed in Michigan, the complaint failed to state a claim because the children with whom Mac seeks visitation are not his siblings. The

trial court properly dismissed Wilson's complaint even though it reached the right result for the wrong reason.

Affirmed.

PARENT AND CHILD — ADOPTION — SIBLING VISITATION.

After the entry of an adoption order, the person or persons adopting the adoptee become the parent or parents of the adoptee under the law as though the adopted person had been born to the adopting parents, and the adopting parents are liable for all the duties and entitled to all the rights of parents; the adoption statute effectively makes the adopted child a natural child of the adopting parents and the adopting parents the natural parents of the child, severing at law the prior, natural family relationship and creating a new and complete substitute relationship after adoption; adoption severs the family relationship between any biological siblings who are not adopted by the same adopting parents and they are no longer siblings (MCL 710.60[1]).

Marquita Wilson *in propria persona* for Mac Sconi.

Before: OWENS, P.J., and TALBOT and WILDER, JJ.

WILDER, J. Plaintiff[1] appeals as of right the trial court's order denying her motion for default judgment and dismissing her case. We affirm.

Plaintiff is the biological mother of three older children. On February 22, 2008, in a separate case, the trial court terminated plaintiff's parental rights to these three children.[2] Defendant, Diane King, subsequently adopted the three older children. On September 11, 2008, plaintiff gave birth to Mac Sconi. According to plaintiff, defendant initially allowed Mac to visit with his three older biological siblings, i.e., defendant's adopted children. However,

[1] Although the minor, Mac Sconi, is seeking visitation rights with his biological siblings, we refer to his mother, Marquita Wilson, as plaintiff throughout the opinion.

[2] We affirmed the trial court's termination in *In re Wilson*, unpublished opinion per curiam of the Court of Appeals, issued October 21, 2008 (Docket Nos. 284357, 284358, 284359, and 284360).

plaintiff claims that defendant eventually prohibited this visitation. Thereafter, on May 10, 2011, plaintiff, as next friend of Mac, filed a complaint for sibling visitation pursuant to the Child Custody Act (CCA), MCL 722.21 *et seq*. Plaintiff requested that the trial court "set a reasonable visitation schedule" for Mac and his three older biological siblings. On June 20, 2011, plaintiff moved for the trial court to enter an order of default against defendant for failure to respond within 21 days of service. Plaintiff and defendant both appeared *in propria persona* at the subsequent default motion hearing. The trial court denied plaintiff's motion and sua sponte dismissed her lawsuit on the basis that Michigan law does not recognize a cause of action for sibling visitation. Plaintiff's subsequent motion for reconsideration was denied.

On appeal, plaintiff argues that Michigan law provides for a cause of action for sibling visitation and, thus, the trial court improperly dismissed her case. Without determining whether Michigan provides for a cause of action for sibling visitation, we nevertheless conclude that the trial court did not err by dismissing plaintiff's case.

At the motion hearing on plaintiff's request for a default judgment, the trial court sua sponte dismissed plaintiff's case because the court concluded that Michigan law did not recognize a cause of action for sibling visitation. Even though the trial court never cited any court rule, we conclude that the trial court's pronouncement that plaintiff had failed to state a "recognized cause of action" is synonymous with failing to state a claim on which relief can be granted.[3] Therefore, we will treat the trial court's actions as a sua sponte granting of summary disposition pursuant to MCR 2.116(I)(1)

[3] MCR 2.116(C)(8) provides that a defendant is entitled to judgment as a matter of law if the plaintiff "has failed to state a claim on which relief can be granted."

and MCR 2.116(C)(8).[4] See *Verna's Tavern, Inc v Heite*, 243 Mich App 578, 584-585; 624 NW2d 738 (2000) (stating that the failure to identify a particular subrule in regard to summary disposition at the trial court does not preclude appellate review as long as the reviewing court has a sufficient record to rule properly).

We review a trial court's granting of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint by the pleadings alone. *Id.* at 119. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the plaintiff. *Id.* "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* (quotation marks and citation omitted).

MCL 710.60 is "commonly referred to as the effect-of-adoption statute," *Jones v Slick*, 242 Mich App 715, 720; 619 NW2d 733 (2000), and it currently provides, in relevant part:

> After the entry of an order of adoption, if the adoptee's name is changed, the adoptee shall be known and called by the new name. The person or persons adopting the adoptee then become the parent or parents of the adoptee under the law as though the adopted person had been born to the adopting parents and are liable for all the duties and entitled to all the rights of parents. [MCL 710.60(1), as amended by 2006 PA 352.][5]

In analyzing MCL 710.60 in light of the CCA in a case

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[4] MCR 2.116(I)(1) allows a trial court to sua sponte grant summary disposition. *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009).

[5] *Jones* addressed MCL 710.60(1) as amended by 1996 PA 409, but the changes made by the 2006 amendment were essentially stylistic and would not have affected the analysis.

involving grandparent visitation, this Court held:

> The effect of MCL 710.60(1) is to make the adopted child, as much as possible, a natural child of the adopting parents, and to make the adopting parents, as much as possible, the natural parents of the child. The Michigan adoption scheme expresses a policy of severing, at law, the prior, natural family relationship and creating a new and complete substitute relationship after adoption. Once a child has a new, complete family as evidenced by adoption, the grandparent visitation statute, MCL 722.27b, ceases to apply. [*In re Toth*, 227 Mich App 548, 553; 577 NW2d 111 (1998) (citations omitted).]

It is undisputed in this case that defendant legally adopted Mac's three older biological siblings. This adoption legally severed, at law, the three older children's "prior, natural family relationship" and created "a new and complete substitute relationship after adoption." *Id*. At law, it is as though the three older children had been born to defendant. MCL 710.60(1). Thus, defendant's adoption of the three older children legally severed their sibling relationship with Mac. Consequently, even if a cause of action to obtain sibling visitation exists,[6] plaintiff's complaint is deficient because the children with whom Mac seeks visitation are not his siblings. Therefore, plaintiff has failed to state a claim on which relief can be granted, and we affirm the trial court's dismissal of plaintiff's claim. The fact that the trial court used different reasoning to reach its decision does not preclude us from affirming the decision because we conclude that the trial court ultimately reached the correct result. See *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011).

Affirmed.

OWENS, P.J., and TALBOT, J., concurred with WILDER, J.

[6] We stress that we are offering no opinion on the viability of such a claim.

ADAIR v MICHIGAN (ON THIRD REMAND)

Docket No. 230858. Submitted August 24, 2010, at Lansing. Decided November 6, 2012, at 9:15 a.m. Order referring matter to special master vacated, 298 Mich App 802. Reversed in part and remanded, 494 Mich 852.

Daniel Adair, the Fitzgerald Public Schools, and others brought an original action in the Court of Appeals against the state of Michigan, the Department of Education, the Department of Management and Budget, and the Michigan Treasurer. Plaintiffs consisted of 456 Michigan public school districts and a taxpayer from each. Plaintiffs alleged, among other claims, that defendants had violated the prohibition of unfunded mandates (POUM) in Const 1963, art 9, § 29, part of the so-called Headlee Amendment, by imposing numerous recordkeeping and reporting requirements on plaintiff school districts. The recordkeeping claim related to the requirements of Executive Order No. 2000-9 and MCL 388.1752 that school districts collect, maintain, and report various types of data to the Center for Educational Performance and Information (CEPI). The Court of Appeals, HOLBROOK, JR., P.J., and TALBOT, J. (SAAD, J., dissenting), granted defendants summary disposition on all claims. 250 Mich App 691 (2002). The Supreme Court granted plaintiffs' application for leave to appeal, 467 Mich 920 (2002), and thereafter reversed in part the judgment of the Court of Appeals, concluding that plaintiffs' recordkeeping claim stated a claim on which relief could be granted, and remanded the case to the Court of Appeals for further proceedings on that claim, 470 Mich 105 (2004). On remand, the Court of Appeals, SAAD, P.J., and TALBOT and FORT HOOD, JJ., concluded that plaintiffs had not supported their claim that the CEPI requirements were an unfunded mandate and again granted summary disposition to defendants. 267 Mich App 583 (2005). Plaintiffs sought leave to appeal in the Supreme Court and filed a motion to disqualify two of the justices. The two justices denied the motion for recusal, 474 Mich 1027 (2006), and the Supreme Court, in lieu of granting plaintiffs leave to appeal, vacated the judgment of the Court of Appeals and remanded the case for it to reevaluate plaintiffs' claims under both prongs of the POUM provision in Const 1963, art 9, § 29: that involving the state's requiring a

new activity or service and that involving a required increase in the level of an activity or service, 474 Mich 1073 (2006). On second remand, the Court of Appeals, in an unpublished order entered April 18, 2006 (Docket No. 230858), appointed former Wayne Circuit Court Judge Pamela R. Harwood as a special master to determine the issue. She concluded that the recordkeeping requirements did present an increase in the level of activity required of plaintiff school districts beyond what was previously required and thus violated Const 1963, art 9, § 29. The Court of Appeals, SAAD, C.J., and TALBOT and FORT HOOD, JJ., then adopted the special master's conclusions of law and findings of fact with some modifications and entered a declaratory judgment for plaintiffs. The Court of Appeals rejected plaintiffs' request for attorney fees under Const 1963, art 9, § 32, concluding that plaintiffs' "suit" had not been "sustained" as required by that constitutional provision. 279 Mich App 507 (2008). Plaintiffs and defendants filed separate applications for leave to appeal, and the Supreme Court granted both applications in part. 483 Mich 922 (2009). The Supreme Court limited the issues on appeal to (1) whether the prohibition of unfunded mandates in Const 1963, art 9, § 29 requires plaintiffs to prove specific costs, either through the reallocation of funds or out-of-pocket expenses, in order to establish their entitlement to a declaratory judgment and (2) whether plaintiffs are entitled to recover the "costs incurred in maintaining" the suit pursuant to Const 1963, art 9, § 32. The Supreme Court issued an opinion that answered the first question in the negative and the second question in the affirmative. The Supreme Court affirmed the declaratory judgment in favor of plaintiffs with regard to their recordkeeping claim and reversed the part of the judgment that held that plaintiffs' suit had not been sustained within the meaning of Const 1963, art 9, § 32, holding that plaintiffs were entitled to the costs incurred in maintaining the action, including an award of reasonable attorney fees incurred in litigating the recordkeeping claim only, and remanded the matter to the Court of Appeals for a determination of costs and attorney fees. 486 Mich 468 (2010). On third remand, the Court of Appeals, pursuant to the agreement of the parties, appointed A. David Baumhart, III, to serve as a special master in the matter and ordered the special master to review the reasonableness of plaintiffs' claim for costs, including attorney fees, and to conduct fact-finding. The special master conducted hearings and issued a report to which plaintiffs and defendants raised objections.

On third remand, the Court of Appeals *held*:

Plaintiffs failed to satisfy their burden of proving the number of hours reasonably expended in the litigating of their recordkeeping claim during phases I and II of this case (phase I having begun with the filing of the original complaint on November 15, 2000, and ended on June 9, 2004, when the Supreme Court issued *Adair v Michigan*, 470 Mich 105 [2004], and phase II having begun on June 9, 2004, and ended on July 14, 2010, when the Supreme Court issued *Adair v Michigan*, 486 Mich 468 [2010]). Plaintiffs were not entitled to attorney fees for phase III of the proceedings (which began on July 14, 2010, and extended through the postjudgment proceedings) because the ratifiers of the Headlee Amendment did not intend that Const 1963, art 9, § 32 authorize an award for attorney fees incurred in postjudgment proceedings. With regard to the other costs incurred in the maintenance of this suit, the special master's construction of the term "costs" was overly restrictive in light of *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Sch*, 455 Mich 1 (1997). This narrow view of what constitutes an awardable cost under § 32 impeded the ability of the Court of Appeals to assess costs in a fair and informed manner.

1. Const 1963, art 9, § 32 is a fee-shifting provision. The Supreme Court intended that the analytical framework contained in *Smith v Khouri*, 481 Mich 519 (2008), be applied to requests for attorney fees under fee-shifting provisions. The *Smith* framework requires a trial judge to determine a baseline reasonable hourly or daily fee rate derived from reliable surveys or other credible evidence showing the fee customarily charged in the locality for similar legal services. The judge must then multiply this rate by a reasonable number of hours expended in the case. The product of this calculation serves as the starting point for calculating a reasonable attorney fee. The judge may make adjustments to the fee after considering certain factors enumerated in MRPC 1.5(a) and *Wood v DAIIE*, 413 Mich 573 (1982), and any additional relevant factors. The party requesting an award of attorney fees bears the burden of proving the reasonableness of the fees requested.

2. Plaintiffs, as the parties requesting the award of attorney fees, had the burden of supporting their attorneys' claimed hours with evidentiary support, including detailed billing records, which the state may contest with regard to reasonableness. An itemized bill of costs is insufficient by itself to establish the reasonableness of the hours claimed, and the trier of fact is not required to accept an itemized bill of costs on its face or an attorney's representation that the hours identified were reasonably expended. The fee applicant must demonstrate by documentation or specific testi-

mony, or both, that the time identified as expended on a billable item was actually and reasonably expended.

3. There was no credible evidence to support plaintiffs' allegation that the recordkeeping claim was one of three major issues pursued by plaintiffs during the early stages of this action or that their attorneys devoted 1/3 of their time to the recordkeeping claim from the date of the filing of the complaint until the Court of Appeals released its first opinion on April 23, 2002, *Adair v Michigan*, 250 Mich App 691 (2002). The proofs presented by plaintiffs were wholly inadequate to allow the Court of Appeals or the special master to determine the number of hours reasonably expended to maintain the recordkeeping claim during this portion of phase I. No attorney fees were awarded for phase I.

4. The meager evidentiary record created with regard to phase II was an impediment to a fair and informed assessment of the number of attorney hours reasonably expended during phase II. Attorney fees were also denied with regard to phase II because plaintiffs failed to carry their burden of proving the number of hours reasonably expended on the recordkeeping claim during phase II.

5. The ratifiers of the Headlee Amendment did not intend that the authority to award costs found in Const 1963, art 9, § 32 extend to postjudgment proceedings. Attorney fees were not awarded with regard to phase III, these postjudgment proceedings and those seeking to implement the declaratory judgment. The word "maintain" in § 32 reflects an intended trial orientation to § 32 and is properly defined to mean to commence, continue, and keep a suit from collapse and to prosecute the suit to achieve an effect.

6. The ruling in *Macomb Co Taxpayers* that the "costs" recoverable under § 32 are not limited to "the ordinary statutorily authorized costs" was not dicta and is binding on the Court of Appeals. Reading *Macomb Co Taxpayers* in conjunction with § 32 makes it clear that the costs awardable under § 32 are those costs incurred by the taxpayer that were necessary to the maintenance of the suit and that were reasonable. The matter of other awardable costs was again referred to the special master for the reopening of proofs and the assessment of which costs incurred by plaintiffs in phases I and II were necessary to the maintenance of the suit and reasonable. For the same reasons that plaintiffs were not entitled to an award of attorney fees incurred in phase III, they were also not entitled to an award of costs incurred during phase III.

7. The filing of the motion to disqualify two Supreme Court justices was not necessary to the litigating of the recordkeeping claim. Plaintiffs were not entitled to an award of the costs associated with the filing of the motion or with the preparation of a motion for reconsideration of the justices' decision not to recuse themselves. Likewise, plaintiffs were not entitled to recover costs associated with the preparation of a motion for reconsideration of the Supreme Court's decision in *Adair v Michigan*, 470 Mich 105 (2004), because the motion was related to plaintiffs' 20 other claims and not the recordkeeping claim.

Plaintiffs held not entitled to award of attorney fees and not entitled to award of certain costs; referred to special master.

1. TRIAL — ATTORNEY AND CLIENT — ATTORNEY-FEE AWARDS.

A party requesting an award of attorney fees bears the burden of proving the reasonableness of the fees requested; the fee applicant must demonstrate by documentation or specific testimony, or both, that the time identified as expended on a billable item was actually and reasonably expended; the trier of fact is not required to accept an itemized bill of costs on its face or to accept an attorney's representation that the hours identified in the bill of costs were reasonably expended.

2. CONSTITUTIONAL LAW — HEADLEE AMENDMENT — WORDS AND PHRASES — AWARDS OF COSTS — MAINTAIN.

The term "maintain" in the provision of the Headlee Amendment governing the costs to be awarded to a taxpayer who sustains an action to enforce the provisions of the Headlee Amendment means, in the context of such an action, to commence, continue, and keep the suit from collapsing and to prosecute the suit to achieve an effect; the phrase "costs incurred in maintaining such suit" reflects an intended trial orientation to the provision, indicating that the ratifiers of the amendment did not intend that the authority to award costs under the provision extend to postjudgment proceedings (Const 1963, art 9, § 32).

3. CONSTITUTIONAL LAW — HEADLEE AMENDMENT — ACTIONS TO ENFORCE HEADLEE AMENDMENT — COSTS.

The "costs" recoverable under the provision of the Headlee Amendment governing the costs to be awarded to a taxpayer who sustains an action to enforce the provisions of the amendment are not limited to the ordinary statutorily authorized costs; awardable costs are those costs incurred by the taxpayer that were necessary to the maintenance of the suit and were reasonable; costs incurred in postjudgment proceedings are not awardable under the provision (Const 1963, art 9, § 32).

Secrest Wardle (by *Dennis R. Pollard* and *Mark S. Roberts*) for plaintiffs.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Timothy J. Haynes*, Assistant Attorney General, for defendants.

ON THIRD REMAND

Before: SAAD, P.J., and TALBOT and FORT HOOD, JJ.

TALBOT, J. This original action returns on remand from our Supreme Court for a determination of costs to be awarded to plaintiffs under § 32 of the Headlee Amendment, Const 1963, art 9, § 32.[1] We referred this matter to a special master, with the consent of the parties, to review the reasonableness of plaintiffs' claim for costs, including attorney fees, and to conduct fact-finding. We have reviewed the report of the special master, the objections of the parties to that report, and the meager evidentiary record. We decline to award plaintiffs any attorney fees. Plaintiffs have failed to

[1] The state asserts that plaintiffs' claim for an award of costs must be dismissed because plaintiffs failed to file with this Court a timely bill of costs, as required by MCR 2.625 and MCR 7.219(B), or otherwise file a timely motion for costs. According to the state, these omissions by plaintiffs serve as a waiver of their right to recover costs under Const 1963, art 9, § 32. In *Adair v Michigan*, 486 Mich 468, 494; 785 NW2d 119 (2010), a majority of the Supreme Court clearly opined that plaintiffs "are entitled to the costs incurred in maintaining this action" and directed this Court to determine on remand the amount of costs and attorney fees to be awarded. We are duty-bound to comply strictly with our Supreme Court's mandate. *Taxpayers of Mich Against Casinos v Michigan*, 478 Mich 99, 111-112; 732 NW2d 487 (2007); *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544-545; 705 NW2d 365 (2005). We conclude that the state's procedural challenge is outside the scope of our Supreme Court's remand directive and, therefore, we decline to consider the challenge.

carry their burden of proving the number of hours reasonably expended in litigating their recordkeeping claim during phases I and II of these proceedings. Moreover, plaintiffs are not entitled to attorney fees for phase III of these proceedings, as a matter of law, because the ratifiers of the Headlee Amendment did not intend § 32 to authorize an award for attorney fees incurred in postjudgment proceedings. With regard to the other costs incurred in the maintenance of this suit, we find the special master's construction of the term "costs" to be overly restrictive in light of *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Sch*, 455 Mich 1; 564 NW2d 457 (1997). This narrow view of what constitutes an awardable cost under § 32 impedes our ability to assess costs in a fair and informed manner and, therefore, we are compelled to return this matter to the special master for the taking of additional proofs and for a recalculation of the costs to be awarded in accordance with this opinion.

COSTS AWARDABLE PURSUANT TO CONST 1963, ART 9, § 32

I. REASONABLE ATTORNEY FEES

Const 1963, art 9, § 32 governs the costs to be awarded to a taxpayer who sustains an action to enforce the provisions of the Headlee Amendment. Section 32 provides:

> Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit.

It is well established that § 32 costs include reasonable attorney fees. *Adair v Michigan*, 486 Mich 468,

494; 785 NW2d 119 (2010); *Macomb Co Taxpayers*, 455 Mich at 7-10; *Durant v Dep't of Ed (On Second Remand)*, 186 Mich App 83, 118; 463 NW2d 461 (1990). What is not so well established, however, is how the reasonableness of those fees is to be determined in actions to enforce the Headlee Amendment. Plaintiffs advocate a reasonableness calculation that employs the framework set forth in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008). The state counters that *Smith* has no application in actions to enforce the Headlee Amendment because the intent underlying § 32 is to provide for the reimbursement of the costs the taxpayer incurred in maintaining the suit and not to compensate the taxpayer at an hourly rate that the taxpayer's attorney might otherwise command. Rather, according to the state, we should assess whether the $175-an-hour fee charged to plaintiffs by their attorneys reflects a reasonable hourly rate. We believe, as did the special master, that plaintiffs advance the more persuasive argument.

In *Smith*, our Supreme Court fashioned a framework to address how a trial judge is to determine reasonable attorney fees for the purpose of awarding case evaluation sanctions under MCR 2.403(O)(6)(b). *Smith*, 481 Mich at 526-530 (opinion by TAYLOR, C.J.). The Court noted, however, that the "aim" of this framework is "to provide a workable, objective methodology for assessing reasonable attorney fees that Michigan courts can apply consistently to our various fee-shifting rules and statutes." *Id*. at 535. Section 32 is a fee-shifting provision. See *id*. at 526-527. Because § 32 is a fee-shifting provision and because our Supreme Court intended the *Smith* analytical framework to apply generally to requests for attorney fees under fee-shifting provisions, we apply the *Smith* framework to assess the reasonableness of the attorney fees sought by plaintiffs. In so

doing, we note that other panels of this Court have employed prior manifestations of this reasonable-fee analytical framework when awarding costs and attorney fees in actions to enforce the Headlee Amendment. See, e.g., *Bolt v City of Lansing (On Remand)*, 238 Mich App 37, 60-62; 604 NW2d 745 (1999); *Durant v Michigan*, unpublished order of the Court of Appeals, entered January 14, 2000 (Docket No. 211740).

A. THE *SMITH v KHOURI* FRAMEWORK

The party requesting an award of attorney fees bears the burden of proving the reasonableness of the fees requested. *Smith*, 481 Mich at 528 (opinion by TAYLOR, C.J.). *Smith* establishes an analytical framework to guide the lower courts in determining what constitutes a "reasonable fee." In general terms, the *Smith* framework requires a trial judge to determine a baseline reasonable hourly or daily fee rate derived from "reliable surveys or other credible evidence" showing the fee customarily charged in the locality for similar legal services. *Id.* at 530-531, 537. Once the trial judge has determined this hourly rate, the judge must multiply this rate by the reasonable number of hours expended in the case. The product of this calculation serves as the "starting point for calculating a reasonable attorney fee." *Id*. at 531, 537. Finally, the trial judge may make up-or-down adjustments to the fee after considering certain factors enumerated in Rule 1.5(a) of the Michigan Rules of Professional Conduct and *Wood v DAIIE*, 413 Mich 573; 321 NW2d 653 (1982), and any additional relevant factors. *Smith*, 481 Mich at 529-531, 537 (opinion by TAYLOR, C.J.).

Because we find the failure of plaintiffs' proofs with regard to the number of attorney hours reasonably expended to be dispositive of plaintiffs' claim for attor-

ney fees, we limit our discussion to this component of the framework set forth in *Smith*.

B. REASONABLE NUMBER OF HOURS EXPENDED

Plaintiffs, as the fee applicants, bear the burden of supporting their claimed hours with evidentiary support, including detailed billing records, which the state may contest with regard to reasonableness. *Smith*, 481 Mich at 532; *Augustine v Allstate Ins Co*, 292 Mich App 408, 432; 807 NW2d 77 (2011). An itemized bill of costs by itself is insufficient to establish the reasonableness of the hours claimed. *Petterman v Haverhill Farms, Inc*, 125 Mich App 30, 33; 335 NW2d 710 (1983). Indeed, the trier of fact is not required to accept an itemized bill of costs on its face, *id*., nor is the trier of fact required to accept an attorney's representation that the hours identified in the bill of costs were reasonably expended, *Sturgis S&L Ass'n v Italian Village, Inc*, 81 Mich App 577, 584; 265 NW2d 755 (1978); see also *Augustine*, 292 Mich App at 423. Rather, the fee applicant must demonstrate by documentation or specific testimony, or both, that the time identified as expended on a billable item was actually and reasonably expended. *Augustine*, 292 Mich App at 432-434; *Petterman*, 125 Mich App at 33.

For purposes of establishing what constitutes a reasonable number of hours expended in maintaining the recordkeeping claim, plaintiffs divided this case into three phases and presented some evidence tailored to each phase. Phase I began with the filing of plaintiffs' original complaint on November 15, 2000, and ended on June 9, 2004, with our Supreme Court issuing *Adair v Michigan*, 470 Mich 105; 680 NW2d 386 (2004), in which the Court remanded the matter to this Court to allow plaintiffs the opportunity to attempt to prove that

they were entitled to relief on the recordkeeping claim. Phase II began on June 9, 2004, and ended on July 14, 2010, with the issuance of *Adair v Michigan*, 486 Mich 468, which affirmed this Court's grant of declaratory relief in favor of plaintiffs, reversed part of this Court's judgment, and remanded this matter for entry of an award of costs, including reasonable attorney fees. Phase III began on July 14, 2010, and extends through these postjudgment proceedings.

1. PHASE I

Plaintiffs' exhibit 9 is a 132-page spreadsheet that serves as plaintiffs' bill of costs. Each entry on the spreadsheet identifies the date of the service provided or expense incurred, the initials of the attorney who provided the service or incurred the cost, a brief, general description of the service provided or cost incurred, the hours spent on providing the service, the amount of any cost incurred, and the total fee or cost sought for each entry. Dennis Pollard and Richard Kroopnick, attorneys for plaintiffs, candidly admitted during their respective testimony before the special master that neither could ascertain from a review of the spreadsheet which recorded costs, or portion of the recorded costs, were solely attributable to litigating the recordkeeping claim. Pollard testified that "through our invoice, we don't identify that we work so many hours or so much time on one issue versus another." Plaintiffs' attorneys did not differentiate in their own recordkeeping between the recordkeeping claim and their other claims because "[w]e weren't clairvoyant enough to know that this would be an issue." Kroopnick added, "[I]t's not possible for me to sit here today and on a particular brief or particular argument to say what portion of the time was devoted to that any more than

I could say that I spent a third of the time addressing res judicata." Because the attorneys could not ascertain the time and resources devoted to the recordkeeping claim during phase I, they simply apportioned the costs incurred during phase I equally among what they perceived to be the three main issues that arose during phase I: res judicata, waiver/release, and the recordkeeping claim.

Although Pollard and Kroopnick testified that they devoted 1/3 of their time to the recordkeeping claim from the filing of plaintiffs' complaint until our Supreme Court issued its June 9, 2004, decision, our review of the pleadings filed in this Court contradicts that testimony in a starkly compelling manner.

Plaintiffs alleged that the recordkeeping claim was one of 21 claims. *Adair*, 486 Mich at 493. The brief that accompanied plaintiffs' original complaint contains barely two pages of analysis. That analysis is limited to a statement that this Court constitutes a proper forum for an action to enforce the Headlee Amendment and a more generalized statement that the state has failed to provide the funding required by Const 1963, art 9, § 29. The analysis does not refer to the recordkeeping claim or any of the other discrete claims alleged in the complaint. Moreover, plaintiffs devoted only three paragraphs of their 37-page answer to the state's initial motion for summary disposition of the recordkeeping claim. The first paragraph merely summarizes the parties' positions. The second and third paragraphs, when combined, are five sentences in length, four of which state factual allegations and one of which acknowledges plaintiffs' readiness to prove those factual allegations and, thereby, their claim. Although plaintiffs subsequently filed a supplemental answer, they used that brief to advance additional arguments in support of their positions that this suit was not

barred by waiver or release or an application of the doctrine of res judicata. Plaintiffs failed to mention the recordkeeping claim in their supplemental brief. The recordkeeping claim did not rise to prominence until this Court elevated the claim to prominence by determining in its April 2002 opinion that the claim was the only claim that survived after an application of the principles governing res judicata and release. *Adair v Michigan*, 250 Mich App 692; 651 NW2d 393 (2002). Consequently, we find no credible record evidence to support plaintiffs' claim that the recordkeeping claim was one of three major issues pursued by plaintiffs during the early stages of this action or that their attorneys devoted 1/3 of their time to the recordkeeping claim from the date of the filing of the complaint until the April 23, 2002, release of this Court's first opinion. Because there is no record evidence to support this claim and because plaintiffs' attorneys have conceded that they cannot ascertain from a review of their spreadsheet which recorded attorney hours were solely attributable to litigating the recordkeeping claim during the early portion of phase I of these proceedings, we find that the proofs presented by plaintiffs are wholly inadequate to allow us to determine the number of hours reasonably expended to maintain the recordkeeping claim during this portion of phase I.

After this Court issued its April 2002 opinion, plaintiffs petitioned our Supreme Court for leave to appeal. The Supreme Court granted leave and directed the parties to brief the following issues:

> (1) whether res judicata bars the claims of those plaintiffs who also were plaintiffs in *Durant v State of Michigan*, 456 Mich 175 [566 NW2d 272] (1997) [*Durant I*], (2) whether the claims of those plaintiffs who were not parties to *Durant I* are barred because the current plaintiff school districts released or waived their current claims by adopting resolutions that conformed to MCL 388.1611f(8), and

> (3) whether the Court of Appeals erred by granting summary disposition for the defendants on the recordkeeping claim that the Court determined was not barred by either res judicata or release. [*Adair v Michigan*, 467 Mich 920 (2002).]

This order confirmed what this Court's April 2002 opinion made apparent—that plaintiffs' recordkeeping claim had risen to prominence in these proceedings. What is not apparent to us, however, is why we should accept plaintiffs' simplistic approach of allocating 1/3 of their attorneys' hours expended during the appellate proceedings in our Supreme Court to the litigation related to the recordkeeping claim. The amount of time plaintiffs' attorneys reasonably devoted to each issue in their appellate brief and during oral argument in the Supreme Court is a function of the factual and legal complexity and the novelty of each issue, not merely the number of issues raised—and yet Pollard acknowledged that "I looked at all the briefs, [but] not in any kind of detail . . . ." Plaintiffs presented no documentation or testimonial evidence from which the special master or this Court could genuinely inquire into the reasonableness of the number of hours plaintiffs expended during their appeal on the recordkeeping claim. Rather, plaintiffs would have us act as though their opinion alone satisfies plaintiffs' evidentiary burden. We decline to so act. A fair and informed assessment of the number of hours reasonably expended cannot be based on evidence that establishes nothing more than that plaintiffs claimed to have expended on the recordkeeping claim 1/3 of the hours listed.

Because plaintiffs failed to cull evidence from their litigation files and the memories of the attorneys involved in the early stages of these proceedings, they have failed to carry their burden of proving the number of hours reasonably expended on the recordkeeping

claim during phase I. We are disinclined to allow plaintiffs a second bite at the apple because plaintiffs already had the opportunity to offer proofs before the special master and instead offered conjecture contradicted by their own filings in this Court. Instead, we award no attorney fees for phase I.

2. PHASE II

Likewise, we find the meager evidentiary record created with regard to phase II to be an impediment to a fair and informed assessment of the number of hours reasonably expended during this phase of the proceedings. As was the case in *Van Elslander v Thomas Sebold & Assoc, Inc*, 297 Mich App 204, 239-240; 823 NW2d 843 (2012), "during the evidentiary hearing the parties appeared to only focus on the big picture and failed to address the details of the billing as there was little questioning or challenging of the amount of time billed for particular services." Consequently, plaintiffs' proofs consisted almost entirely of the opinion testimony of Pollard and Kroopnick that the attorney hours reported in the 132-page bill of costs were both reasonable and necessary to the maintenance of the recordkeeping claim. This evidence alone is insufficient to establish the reasonableness of the hours claimed by plaintiffs. *Augustine*, 292 Mich App at 432-434; *Petterman*, 125 Mich App at 33; *Sturgis S&L*, 81 Mich App at 584. Because plaintiffs have failed to carry their burden of proving the number of hours reasonably expended on the recordkeeping claim during phase II, we also decline to award attorney fees for this phase of the proceedings.

3. PHASE III

Finally, we decline to award any attorney fees associated with these postjudgment proceedings or with the

postjudgment proceedings to implement the declaratory judgment. Because plaintiffs "sustained" their action to enforce the Headlee Amendment, pursuant to § 32 of the amendment, they are entitled to recoup the "costs incurred in maintaining such suit." The term "maintain" is not defined in the applicable provisions of the Headlee Amendment, Const 1963, art 9, §§ 32 and 33, or in the legislation that implements the amendment, MCL 21.231 *et seq*. In the absence of such definitional provisions, this Court must apply the rule of common understanding to ascertain the meaning of this term. *Adair*, 486 Mich at 492-493. *Random House Webster's College Dictionary* (2d ed, 1997) defines "maintain" as "to keep in existence or continuance; preserve." The online *Merriam-Webster Dictionary* defines "maintain" as "to keep in an existing state" and "preserve from failure or decline."[2] In other words, in the context of an action to enforce the Headlee Amendment, the term "maintain" means to commence, continue, and keep a suit from collapse and to prosecute the suit to achieve an effect. Understood in this manner, the phrase "costs incurred in maintaining such suit" reflects an intended trial orientation to § 32. Compare *Haliw v Sterling Hts*, 471 Mich 700, 707; 691 NW2d 753 (2005) (indicating that the language of MCR 2.403[O][1] reflects that the court rule is trial-oriented). Thus, the ratifiers of the amendment did not intend that the authority to award costs found in § 32 extend to postjudgment proceedings.

II. OTHER REASONABLE COSTS INCURRED

Although it is well established that § 32 costs include reasonable attorney fees, the parties disagree regarding what other costs may be awarded under this section.

[2] <http://www.merriam-webster.com/dictionary/maintain> (accessed October 25, 2012).

Plaintiffs assert that recoverable costs under § 32 include all expenses that they actually incurred in pursuing their recordkeeping claim. The special master rejected plaintiffs' position and, instead, concluded that the costs awardable under § 32 include costs that are traditionally taxable, as well as those other costs that are reasonable and authorized by the "neutral procedural provisions"[3] of the Michigan Court Rules and the Revised Judicature Act (RJA), MCL 600.101 *et seq*. We decline to adopt either the position of plaintiffs or the analysis of the master. The former is too broad; the latter is too narrow.

Any discussion regarding what costs are to be awarded under § 32 necessarily begins with a review of *Macomb Co Taxpayers*, 455 Mich 1, wherein our Su-

[3] This Court has observed that although a state court awarding costs under the Magnuson-Moss Warranty Act, 15 USC 2301 *et seq*., is authorized to award costs that otherwise are not taxable under the Revised Judicature Act, the neutral procedural rules of a state may remain applicable to those awards. *LaVene v Winnebago Indus*, 266 Mich App 470, 480 n 9; 702 NW2d 652 (2005). The Court in *LaVene* cited as support for this observation the decision of the United States Supreme Court in *Howlett ex rel Howlett v Rose*, 496 US 356, 372; 110 S Ct 2430; 110 L Ed 2d 332 (1990), wherein the Court opined that "[s]tates may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law." The Court in *LaVene* used this rule to conclude that the trial court did not err by awarding costs arising from three depositions when those depositions were filed with the court clerk and admitted into evidence as required by MCL 600.2549. We decline to take any guidance from *LaVene*. Our application of the term "costs" must be informed by the intent of those who ratified the Headlee Amendment, not principles of federal law. Moreover, the plain language of MCL 600.2549 reveals that it is a statutory provision that enumerates the prerequisites for awarding the costs associated with the taking of a deposition as taxable costs. The reliance of the special master on "neutral state rules" to limit the costs awardable in this action had the practical effect of limiting the award of costs, in some regards, to those costs awarded under the traditional notion of taxable costs as understood by the legal profession, in contravention of *Macomb Co Taxpayers*, 455 Mich at 8-10.

preme Court was tasked with determining whether attorney fees were recoverable as a cost under § 32. The Court adopted the rationale of *Durant*, 186 Mich App 83, and likewise concluded that attorney fees are awardable as part of the costs allowed under Const, art 9, § 32. The *Macomb Co Taxpayers* Court elaborated further:

> The state defendants argue that we should charge the voters who enacted the Headlee Amendment with knowledge of technical details of our legal system, such as the so-called American rule (as opposed to the British rule) for awarding costs. And, according to the state defendants, "there is no basis for believing the voters intended prevailing taxpayers in Headlee litigation to receive anything other than the ordinary statutorily authorized costs." We disagree.
>
> In *Schmidt v Dep't of Ed*, 441 Mich 236, 257, n 24; 490 NW2d 584 (1992), we noted, in relevant part:
>
> "A short time after the Headlee Amendment was ratified by the voters, its drafters prepared notes reflecting their view of the amendment's intent. Although the drafters' notes are not authoritative, *Durant* [*v State Bd of Ed*, 424 Mich 364, 382 n 12; 381 NW2d 662 (1985)], they are one piece of evidence concerning the common understanding of the voters' intent."
>
> The drafters' note relative to § 32 states:
>
> "By costs, the drafters meant all expenses incurred in maintaining such suit, including, but not limited to filing fees, service fees, witness fees, discovery expenses, attorney fees and reasonable reimbursement for plaintiffs' time and travel. [Shaker, Drafters' Notes—Tax Limitation Amendment (Taxpayers United Research Inst, 1979), § 32, p 19.]"
>
> We think this "one piece of evidence" weighs in favor of our conclusion that the voters who ratified the Headlee Amendment understood the word "costs" in its more common meaning of "all expenses," rather than the limited, technical use of the word as a legal term of art.

> We find further support for our conclusion that the voters who enacted the Headlee Amendment did not understand the word "costs" in the same sense that lawyers understand that word by the fact that the word "costs" is used elsewhere in the Headlee Amendment in a context that precludes the technical interpretation urged on us by the state defendants. Const 1963, art 9, § 29 provides, in relevant part: "The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law." The sense of the word "costs" in this sentence is synonymous with the phrase "expenses" (or "total expenditures"). Furthermore, § 29 also states: "The provision of this section shall not apply to costs incurred pursuant to Article VI, Section 18." Article 6, § 18 deals with the salaries of justices and judges of Michigan state courts, one of the "costs" incurred in the maintenance of our judicial system. This more common usage of the word "costs" leads us to conclude that the common understanding of the people in enacting the Headlee Amendment was that "costs" would include all expenses arising from the conduct of litigation under the Headlee Amendment. [*Macomb Co Taxpayers*, 455 Mich at 8-10.]

As plaintiffs correctly observe, the special master erroneously concluded that "the *Macomb County* Court's observations concerning 'all costs' or 'actual costs' are *dicta*." "[D]ictum is a ' "judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)." ' " *Carr v City of Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003) (citations omitted). One of the issues before our Supreme Court in *Macomb Co Taxpayers* was whether attorney fees were awardable as "costs" under Const, art 9, § 32. The Court necessarily had to determine what the voters understood the term "costs" to mean in order to determine whether attorney fees fell within the ambit of the term. Under such circum-

stances, the Court's discussion of what constitutes a cost allowable under § 32 was necessary to the Court's decision. The discussion was not dicta. Therefore, we are bound by the *Macomb Co Taxpayers* Court's ruling that the "costs" recoverable under § 32 are not just limited to "the ordinary statutorily authorized costs." *Macomb Co Taxpayers*, 455 Mich at 8 (quotation marks omitted).

With regard to what costs may be reimbursable in this case, we note that the Court in *Macomb Co Taxpayers* referred to as examples of costs awardable under § 32 both costs traditionally taxable under the RJA as well as costs otherwise not taxable under the RJA. Compare *Macomb Co Taxpayers*, 455 Mich at 9, with MCL 600.2401 *et seq*. and MCL 600.2501 *et seq*. The Court also recognized a reasonableness component to the costs awarded. *Macomb Co Taxpayers*, 455 Mich at 8-9 (noting that costs under § 32 include a reasonable attorney fee and reasonable reimbursement for a plaintiff's time and travel). When *Macomb Co Taxpayers* is read in conjunction with the § 32 mandate that the taxpayer receive "his costs incurred in maintaining such suit," it becomes clear that the costs awardable under § 32 are those costs "incurred" by the taxpayer that were necessary to the maintenance of the suit and reasonable. Determining costs in this manner furthers the intent underlying § 32 because it ensures that the average taxpayer is provided with the financial wherewithal to "withstand the financial obligation incurred as a result of exercising that taxpayer's right to bring suit." *Durant*, 186 Mich App at 118.

In the light of the foregoing, we again refer the matter of other awardable costs to the special master for the reopening of proofs and an assessment of which costs incurred by plaintiffs in phases I and II of these proceedings were necessary to the maintenance of the suit and reasonable. For the same reasons that plain-

tiffs are not entitled to an award of attorney fees incurred in phase III, they are also not entitled to an award of other costs incurred during that phase.

III. SPECIFIC COSTS

Plaintiffs seek to recover the actual costs associated with the preparation and filing of a motion to disqualify two justices of our Supreme Court on the ground that their respective spouses were employed by opposing counsel. Those justices declined to recuse themselves. *Adair v Michigan*, 474 Mich 1073 (2006). Plaintiffs assert that the filing of the motion was reasonable and necessary to sustaining plaintiffs' recordkeeping claim. We conclude, however, that the motion to disqualify the justices was not necessary to the litigating of the recordkeeping claim as shown by the fact that plaintiffs were able to keep their suit from collapsing and prosecute their suit to a result despite the denial of the motion. Thus, we conclude that plaintiffs are not entitled to an award of the costs associated with the filing of the motion to disqualify or those associated with the preparation of a motion for reconsideration of the decision of the justices not to recuse themselves, especially given that the motion for reconsideration was never filed.

Likewise, plaintiffs are not entitled to recover the costs associated with the preparation of a motion for reconsideration of our Supreme Court's first decision. The motion was related to plaintiffs' 20 other claims and not the maintenance of the recordkeeping claim.

Referred to the special master.* We retain jurisdiction.

SAAD, P.J., and FORT HOOD, JJ., concurred with TALBOT, J.

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*Order referring matter to special master subsequently vacated, 298 Mich App 802.—REPORTER.

In re PAROLE OF HILL

Docket No. 301364. Submitted January 5, 2012, at Grand Rapids. Decided November 8, 2012, at 9:00 a.m.

The Berrien County Prosecutor applied in the Berrien Circuit Court for leave to appeal the Parole Board's grant of parole to Ronald Wynn Hill, a prisoner under the jurisdiction of the Department of Corrections. The Parole Board intervened. Hill requested appointment of counsel for the prosecutor's appeal of the Parole Board's decision. The court, John E. DeWane, J., granted the request as well as the prosecutor's motion to stay the parole order pending the appeal. The court declined to address the constitutional issues of whether Hill was entitled to appointment of counsel, but reasoned that a circuit court has limited inherent authority to compel appropriations to carry out its constitutional responsibilities and that the appointment of counsel was reasonable and necessary for the administration of justice. After the prosecutor sought leave to appeal in the Court of Appeals, the circuit court reversed the Parole Board's decision to parole Hill. The Court of Appeals granted the prosecutor leave to appeal the order appointing appellate counsel.

The Court of Appeals *held*:

1. Courts will not address moot questions that have no practical legal effect unless the issue is one of public significance that is likely to recur, yet evade judicial review. The issues presented were not moot. Although the prosecutor's appeal of the Parole Board's decision is no longer pending in the circuit court, the issue of appointment of counsel for indigent criminal defendants during similar appeals by other, similarly situated, defendants is of public significance and likely to recur, yet evade review.

2. An indigent criminal defendant has a due process right to appointed counsel at every stage of every criminal proceeding when the substantial rights of the accused criminal may be affected. The mere fact that a state has a parole process is insufficient to confer a protected liberty interest to a prisoner. Rather, the possibility of parole provides no more than a mere hope that the benefit will be obtained. A liberty interest is triggered only after the Parole Board's order has been effectuated by the

prisoner's release from prison. A state creates a protected liberty interest by placing substantive limitations on official discretion. Michigan's parole system does not create a constitutionally protected interest in parole. Rather, as part of the parole process, MCL 791.234(11) allows the prosecutor or the victim to appeal the Parole Board's decision to grant parole to the circuit court. During that review the circuit court ensures that the Parole Board did not abuse its discretion or violate the state constitution, a statute, administrative rule, or other regulation. Hill did not have a due process right to appointed counsel during the prosecutor's appeal of the Parole Board's decision to grant parole. Although the Parole Board had decided to grant parole, at the time of the prosecutor's appeal Hill remained incarcerated, did not benefit from the liberties of a probationer or parolee who have been released from prison before a revocation hearing, and therefore had not yet acquired a constitutionally protected expectation that the parole order would be effectuated. MCL 791.236(2), which allows the Parole Board to rescind a parole order for cause before a prisoner is released on parole, did not trigger a due process liberty interest because the order remained pending for circuit court review.

3. The Equal Protection Clause ensures that people similarly situated will be treated alike, but does not guarantee that people in different circumstances will be treated the same. Unless the discrimination impinges on the exercise of a fundamental right or involves a suspect class, the inquiry is whether the classification is rationally related to a legitimate governmental purpose. Fundamental rights include due process in criminal matters. MCR 7.118(D)(3)(b)(i) allows a prisoner to respond to a prosecutor's appeal of a parole-release decision through retained counsel or in propria persona. The court rule does not violate the Equal Protection Clause and Hill was not entitled to appointed counsel during the prosecutor's appeal of the Parole Board's decision to grant parole. As an incarcerated prisoner involved in the parole process Hill was not a member of a suspect class and did not have a due process liberty interest; accordingly, the rational basis test applied to MCR 7.118(D)(3)(b)(i). Although the rule may result in some inequality, it is rationally related to the legitimate governmental purpose of preserving scarce court resources.

4. Circuit courts have an inherent power to appoint counsel to represent indigent litigants to render justice in exceptional circumstances. In addition, circuit courts can direct and control the proceedings before them, make any order to effectuate their jurisdiction and have the authority to allocate previously apportioned funds in a manner it deems best to facilitate the fair and

orderly disposition of its proceedings. The circuit court did not abuse its discretion by using court funds, which had previously been apportioned for appointing appellate counsel for indigent defendants, to appoint appellate counsel for Hill. The case involved a complex parole proceeding and Hill has a learning disability. Because the circuit court has broad authority to facilitate the fair and orderly disposition of cases and controversies, it had discretion to appoint counsel for Hill, an indigent inmate, during the prosecutor's appeal of the Parole Board's decision.

Affirmed.

1. PAROLE — PAROLE BOARD — APPEALS OF PAROLE ORDERS — APPOINTMENT OF COUNSEL — DUE PROCESS.

An indigent criminal defendant has a due process right to appointed counsel at every stage of every criminal proceeding when the substantial rights of the accused criminal may be affected; the mere fact that a state has a parole process is insufficient to confer a protected liberty interest to a prisoner and the possibility of parole provides no more than a mere hope that the benefit will be obtained; when a Parole Board grants parole the incarcerated defendant does not have a due process right to appointed counsel during a prosecutor's or victim's appeal, brought under MCL 791.234(11), of the Parole Board's decision; a liberty interest is triggered only after the Parole Board's order has been effectuated by the prisoner's release from prison.

2. PAROLE — APPEALS OF PAROLE ORDERS — APPOINTMENT OF COUNSEL — EQUAL PROTECTION.

Under MCR 7.118(D)(3)(b)(i), a prisoner may respond to a prosecutor's appeal of a parole-release decision through retained counsel or in propria persona; the court rule does not violate the Equal Protection Clause because an incarcerated prisoner involved in the parole process is not a member of a suspect class and does not have a due process liberty interest; although MCR 7.119(D)(3)(b)(i) may result in some inequality, it is rationally related to the legitimate governmental purpose of preserving scarce court resources.

3. COURTS — DISCRETION OF COURTS — APPOINTMENT OF COUNSEL — APPEAL OF PAROLE BOARD DECISIONS.

Circuit courts have an inherent power to appoint counsel to represent indigent litigants to render justice in exceptional circumstances; circuit courts can direct and control the proceedings before them, make any order to effectuate their jurisdiction and have the authority to allocate previously apportioned funds in a manner it deems best to facilitate the fair and orderly disposition

of its proceedings; a circuit court has discretion to use funds that had previously been apportioned for appointing appellate counsel for indigent defendants to appoint appellate counsel for a defendant during a prosecutor's appeal of a Parole Board order granting parole.

Arthur J. Cotter, Prosecuting Attorney, and *Aaron J. Mead*, Assistant Prosecuting Attorney, for the Berrien County Prosecuting Attorney.

State Appellate Defender (by *Susan M. Meinberg* and *Marla R. McCowan*) for Ronald W. Hill.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *H. Steven Langschwager*, Assistant Attorney General, for the Parole Board.

Before: HOEKSTRA, P.J., and MARKEY and BORRELLO, JJ.

BORRELLO, J. Appellant, Berrien County Prosecutor, appeals by leave granted the trial court's order granting appellee Ronald Wynn Hill's request for appointed counsel during the prosecutor's appeal of the decision by the intervenor Parole Board (Board) to grant Hill parole. For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

In 1998, defendant pleaded guilty to second-degree murder for a death that resulted from a Molotov cocktail that was thrown through the window of his ex-girlfriend's home. Defendant was sentenced to 10 to 50 years' imprisonment. After several denials, the Board granted Hill parole on July 22, 2010. On August 30, 2010, the prosecutor applied for leave to appeal the Board's decision in the circuit court pursuant to MCL 791.234(11), and moved to stay the parole order. The circuit court granted the prosecutor's application and motion to stay.

Hill petitioned the trial court for a court-appointed attorney to represent him during the pendency of the prosecutor's appeal. The prosecutor objected, arguing that because Hill did not have a constitutional or statutory right to parole, he did not have a right to appointed counsel, and the circuit court did not have the authority to compel public funding to appoint counsel. The prosecutor maintained that the power to appropriate public funding for appointed counsel belonged to the Legislature, and argued that the judiciary's inherent power to compel appropriations to carry out its constitutional responsibilities was strictly limited. The prosecutor cited *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 143; 719 NW2d 553 (2006), wherein our Supreme Court articulated that a circuit court has limited inherent authority to compel appropriations to carry out its constitutional responsibilities.

On November 10, 2010, the circuit court held a hearing to address the issue and concluded that it had the "inherent right under the . . . separation of powers to do what is reasonable and necessary to see that justice is done and to carry out the constitutional and statutory mandates and duties of the court in a fair manner." The circuit court held that *Crawford Co* did not apply in this case because by appointing counsel, the circuit court did not need to order "any additional appropriation by the funding unit for any court purposes." Instead, the court intended to use funding that had already been appropriated for appointing appellate counsel for indigent defendants, "in a manner that we determine to be reasonable and necessary." The court concluded that the appointment of counsel was critical for the administration of justice. The court found that Hill was not capable of articulating the nuances involved with the appeal and stated that it would appoint counsel to represent Hill for the pendency of the pros-

ecutor's appeal. The circuit court declined to address the constitutional issue of whether Hill was entitled to appointed counsel and instead concluded that such appointment was "reasonable and necessary for the fair administration of justice." The circuit court then entered an order appointing counsel for Hill.

On December 1, 2010, the prosecutor applied in this Court for leave to appeal the circuit court's order appointing counsel. Before this Court granted the prosecutor's application, on February 17, 2011, the trial court reversed the Board's order granting Hill parole.[1] On February 18, 2011, this Court granted the prosecutor's application for leave to appeal.[2] On appeal, the prosecutor argues that the circuit court's authority to appropriate and spend public funds is limited to what is necessary to carry out the court's constitutional responsibilities and that appointing counsel for Hill was not necessary to carry out any constitutional responsibility because Hill did not have a statutory or constitutional right to counsel.

II. MOOTNESS

As already noted, proceedings continued in the lower court after the prosecutor had moved for leave to appeal in this Court. The circuit court addressed the prosecutor's appeal and reversed the Board's decision to parole Hill. The Board moved for reconsideration of that decision and proceedings are no longer ongoing. "This Court's duty is to consider and decide actual cases and controversies." *Morales v Parole Bd*, 260 Mich App 29, 32; 676 NW2d 221 (2003). "To that end, this Court does

[1] Subsequently, the Attorney General, on behalf of the Parole Board, moved for reconsideration.

[2] *In re Parole of Hill*, unpublished order of the Court of Appeals, entered February 18, 2011 (Docket No. 301364).

not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before us unless the issue is one of public significance that is likely to recur, yet evade judicial review." *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002), abrogated on different grounds by *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 471-472; 719 NW2d 19 (2006). The issues in this case are of public significance and likely to recur, yet evade judicial review. Although Hill's case is no longer pending, prosecutors in this state will continue to appeal parole board decisions to grant parole. Thus, the issue of whether a circuit court has authority to appoint counsel during similar appeals is of public significance and likely to recur, yet evade review. Furthermore, we cannot find any published federal or state cases on the pertinent issues presented in this appeal. We therefore deem resolution of these issues necessary insofar as their resolution may provide legal guidance to tribunals who will decide these issues in the future. Accordingly, we do not determine the issues presented moot and will address them in this opinion. See *Morales*, 260 Mich App at 32.

III. STANDARDS OF REVIEW

The scope of a circuit court's powers involves a question of law that we review de novo. *Traxler v Ford Motor Co*, 227 Mich App 276, 280; 576 NW2d 398 (1998). Whether an incarcerated defendant has a constitutional right to appointed counsel during a prosecutor appeal of a parole board decision, necessarily involves an issue of constitutional law that we also review de novo. *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004).

IV. ANALYSIS

A. THE PAROLE PROCESS IN MICHIGAN

A prisoner comes under the jurisdiction of the Parole Board after serving his or her minimum sentence, adjusted for good time or disciplinary credits. MCL 791.233(1)(a) through (d); MCL 791.234(1) through (5); *In re Parole of Haeger*, 294 Mich App 549, 552; 813 NW2d 313 (2011). The parole process is guided by statutorily mandated parole guidelines, *Haeger*, 294 Mich App at 553, but ultimately, "matters of parole lie solely within the broad discretion of the [Board] . . . ." *Jones v Dep't of Corrections*, 468 Mich 646, 652; 664 NW2d 717 (2003); see also MCL 791.234(11); MCL 791.235(1). If the Board decides to grant parole, either the prosecutor of the county from which the prisoner was committed or the victim of the crime may apply for leave to appeal the Board's decision in the circuit court. MCL 791.234(11); *In re Parole of Elias*, 294 Mich App 507, 538; 811 NW2d 541 (2011). A prisoner "may respond to the application for leave to appeal through retained counsel or in propria persona, although no response is required," MCR 7.118(D)(3)(b)(i); however, a prisoner has no right to appeal the Board's decision to deny parole. See *Morales*, 260 Mich App at 34-40. Once the Board enters an order granting parole, it has discretion to rescind that order for cause before the prisoner is released and after the Board conducts an interview with the prisoner. MCL 791.236(2). After a prisoner is released on parole, the prisoner remains in the legal custody and control of the Department of Corrections and the Board retains discretion to revoke parole for cause and in accord with statutorily proscribed procedural guidelines. *Jones*, 468 Mich at 652-653; MCL 791.238; MCL 791.240a.

B. CONSTITUTIONAL RIGHT TO APPOINTED COUNSEL

1. DUE PROCESS LIBERTY INTEREST

Initially we note that Hill does not contend that there is a statute that confers a right to appointed counsel during a prosecutor appeal of a parole-release decision. Thus, we proceed by addressing Hill's contention that he possessed a constitutional right to appointed counsel. The prosecutor argues that the circuit court was not required to appoint counsel for Hill in order to carry out its constitutional responsibilities because Hill did not have a constitutional right to counsel. Conversely, Hill argues that the circuit court did not err by appointing counsel because he had a constitutionally protected right to appointed counsel during the pendency of the prosecutor's appeal. Hill's argument is based on his contention that a prisoner has a protected liberty interest once the Board makes its initial decision to grant parole.

The federal and state constitutions both guarantee that a person may not be deprived of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17; *Hanlon v Civil Serv Comm*, 253 Mich App 710, 722; 660 NW2d 74 (2002). "Procedural due process limits actions by the government and requires it to institute safeguards in proceedings that affect those rights protected by due process, such as life, liberty, or property." *Kampf v Kampf*, 237 Mich App 377, 382; 603 NW2d 295 (1999). "Whether the due process guarantee is applicable depends initially on the presence of a protected 'property' or 'liberty' interest." *Hanlon*, 253 Mich App at 723. "It is only when a protected interest has been found that we may proceed to determine what process is due." *Williams v Hofley Mfg Co*, 430 Mich 603, 610; 424 NW2d 278 (1988).

It is well-settled law that an indigent criminal defendant has the right to appointed counsel "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa v Rhay*, 389 US 128, 134; 88 S Ct 254; 19 L Ed 2d 336 (1967). However, parole proceedings are not part of the criminal prosecution. *Morrissey v Brewer*, 408 US 471, 480; 92 S Ct 2593; 33 L Ed 2d 484 (1972). In the context of parole, the United States Supreme Court has held that "there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence," because the person's "conviction, with all its procedural safeguards, has extinguished that liberty right." *Greenholtz v Inmates of Nebraska Penal & Correctional Complex*, 442 US 1, 7; 99 S Ct 2100; 60 L Ed 2d 668 (1979). In addition, the mere fact that a state has a parole process is insufficient to confer a protected liberty interest to a prisoner: "That the state holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained." *Id*. at 11.

In some instances, a liberty interest can arise in the context of parole. For example, a parolee facing parole revocation has a protected liberty interest such that he is entitled to some due process protection. *Morrissey*, 408 US at 480-485. Similarly, a probationer has a protected liberty interest that requires due process protection during revocation proceedings. *Gagnon v Scarpelli*, 411 US 778, 782; 93 S Ct 1756; 36 L Ed 2d 656 (1973). Furthermore, specific language in a state statute can create a liberty interest in parole release that requires some form of due process protection where the statute limits discretion of the parole authority. *Greenholtz*, 442 US at 11-12; see also *Bd of Pardons v Allen*, 482 US 369, 374-376; 107 S Ct 2415; 96 L Ed 2d 303 (1987). The United States Supreme Court has explained

that "a State creates a protected liberty interest by placing substantive limitations on official discretion. An inmate must show that particularized standards or criteria guide the State's decisionmakers." *Olim v Wakinekona*, 461 US 238, 249; 103 S Ct 1741; 75 L Ed 2d 813 (1983) (quotation marks and citation omitted).[3] However, Michigan's parole system, in and of itself, does not create a constitutionally protected interest in parole. See *Glover v Parole Bd*, 460 Mich 511, 521; 596 NW2d 598 (1999) (holding that an inmate does not have a due process right to a written explanation of a Board denial of parole); *Hurst v Dep't of Corrections, Parole Bd*, 119 Mich App 25, 28-29; 325 NW2d 615 (1982) (holding that the relevant Michigan statutes did not create a constitutionally protected right to parole); *Morales*, 260 Mich App at 50-51 ("[N]either the constitution nor the parole statute creates a right to parole for inmates.") (quotation marks and citation omitted); *Haeger*, 294 Mich App at 549, 574-575 (holding that an inmate had no due process rights during prosecutorial appeal of parole order); *Sweeton v Brown*, 27 F 3d 1162, 1164-1165 (CA 6, 1994) (holding that Michigan's parole system, specifically, MCL 791.231, provided such broad discretion to the Board that the prisoner had no protected liberty interest).[4]

In this case, Hill does not contend that the parole process in Michigan in and of itself confers a protected liberty interest. Moreover, Hill cannot argue that he enjoyed the same liberties as a parolee or probationer because he remained incarcerated pending resolution of the prosecutor's appeal. Thus, *Morrissey*, 408 US at

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[3] See also 59 Am Jur 2d, Pardon and Parole, § 103, pp 111-113 (describing how a state's parole statute can create an expectation of release that gives rise to a liberty interest in parole).

480, and *Gagnon*, 411 US at 778, are inapposite. However, at the same time, the Board entered an order to grant Hill parole. He had more than a mere hope that he would obtain such an order. See *Greenholtz*, 442 US at 11. Indeed, after the Board granted parole, but before his release, the Board could only rescind that order for cause. See MCL 791.236(2) ("A parole order may be rescinded at the discretion of the parole board for cause before the prisoner is released on parole."). Nevertheless, although the Board decided to grant parole, we conclude that Hill had not yet acquired a constitutionally protected expectation that the Board's order would be effectuated.

In reaching this conclusion we are guided by this Court's holding in *Haeger*, 294 Mich App at 549, and the United States Supreme Court's decision in *Jago v Van Curen*, 454 US 14; 102 S Ct 31; 70 L Ed 2d 13 (1981). In *Jago*, the Supreme Court addressed whether a prisoner who had his parole order revoked immediately before he was released from prison was entitled to due process and a hearing. *Id*. at 14-16. In that case a panel of the Ohio Adult Parole Authority (OAPA) recommended early parole for the respondent, a prison inmate, and the parole board approved the recommendation and notified the respondent. *Id*. at 14-15. The respondent was set to be released when the OAPA learned that he had been dishonest during the parole-decision process. *Id*. at 15. The parole board rescinded the order of parole without holding a hearing. *Id*. Following an unsuccessful appeal in the United States District Court for the Southern District of Ohio, the United States Court of Appeals for the Sixth Circuit agreed with the respondent and held that the order conferred a due process liberty interest on the basis of "mutually explicit understandings." *Id*. at 16 (quotation marks omitted). The Sixth Circuit reasoned, " 'Having been notified that he "ha[d] been paroled" . . . , [re-

spondent] had a legitimate expectation that his early release would be effected.' " *Id*. at 17 (citation omitted). The Supreme Court reversed the Sixth Circuit and held that the appellate court erred by finding a protected liberty interest on the basis of "mutually explicit understandings." *Id*. The Court explained that, while a "mutually explicit understanding" was relevant to determine whether a person was deprived of a property interest, the standard did not apply to determining whether an inmate had a liberty interest in parole. *Id*. at 18-19. The Court concluded that the Ohio statutes gave full discretion regarding matters of parole to the Board and that the respondent had not obtained a protected liberty interest when he received notice that he would be paroled. *Id*. at 20-21.

In *Haeger*, the Board granted Raymond Haeger parole, but the circuit court reversed the Board's decision following a prosecutor appeal. *Haeger*, 294 Mich App at 551. On appeal, Haeger argued in part, that he was denied due process when, following the prosecutor's appeal, the circuit court had deprived him of an adequate opportunity to be heard. *Id*. at 574-575. In rejecting Haeger's argument, this Court relied on *Greenholtz* and explained:

> [A] potential parolee who remains in prison has no liberty to protect. As noted by the United States Supreme Court, "parole *release* and parole *revocation* are quite different. There is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires." A prisoner awaiting release on parole remains "confined and thus subject to all of the necessary restraints that inhere in a prison." The 'mere hope that the benefit' of parole 'will be obtained' is too general and uncertain, and therefore, "is not protected by due process." [*Id*. at 575, quoting *Greenholtz*, 442 US at 9, 11.]

Like in *Haeger* and *Jago*, although the Board entered an order granting Hill parole, the order had not been effectuated and Hill had not yet obtained a protected liberty interest. Rather, Hill remained incarcerated pending circuit court review of the Board's order; such review is a component of the discretionary parole process in Michigan—a process that does not give rise to a protected liberty interest in parole. See *Glover*, 460 Mich at 520; *Hurst*, 119 Mich App at 28; *Morales*, 260 Mich App at 50-51. Specifically, the Legislature has included a mechanism in the parole process that allows the prosecutor or the victim to appeal a Board decision to grant parole. MCL 791.234(11); *Elias*, 294 Mich App at 538. Indeed, circuit court review is contemplated as part of the parole process and the Board is required to, "issue in writing a sufficient explanation for its decision to allow meaningful appellate review." *Haeger*, 294 Mich App at 556 (quotation marks and citation omitted). During circuit court review, the court ensures that the Board did not abuse its discretion or violate the state constitution, a statute, administrative rule, or other regulation. *Elias*, 294 Mich App at 538. Thus, given that the parole process had not yet fully transpired, Hill did not have an expectation that the Board's order would be effectuated.

Hill argues that MCL 791.236(2) triggers a due process liberty interest. MCL 791.236(2) provides in relevant part that "[a] parole order may be rescinded at the discretion of the parole board for cause before the prisoner is released on parole." Relying on this "for cause" language, Hill contends that, he "could reasonably expect to enforce [the initial parole order] against prison officials." However, although the Board could not rescind the parole order absent good cause, Hill did not have an expectation that the order would be effectuated because the order remained pending for circuit court

review. Thus, we hold that MCL 791.236(2) did not create an expectation that the circuit court would affirm the Board's order.

Hill compares this case to parole-revocation proceedings, which require a certain level of due process protection. See *Morrissey*, 408 US at 480; *Gagnon*, 411 US at 787-791; see also MCL 791.240a (during a parole-revocation hearing in Michigan, a parolee is in part entitled to written notice, a hearing, and, for indigent parolees, appointment of counsel). However, parole revocation is distinct from a discretionary parole process that incorporates circuit court review—the process at issue in this case. The Supreme Court in *Greenholtz* articulated the difference between parole revocation and parole release as follows:

> [P]arole *release* and parole *revocation* are quite different. There is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires. The parolees in *Morrissey* (and probationers in *Gagnon*) were at liberty and as such could "be gainfully employed and [were] free to be with family and friends and to form the other enduring attachments of normal life" The inmates here, on the other hand, are confined and thus subject to all of the necessary restraints that inhere in a prison.
>
> A second important difference between discretionary parole *release* from confinement and *termination* of parole lies in the nature of the decision that must be made in each case. As we recognized in *Morrissey*, the parole-revocation determination actually requires two decisions: whether the parolee in fact acted in violation of one or more conditions of parole and whether the parolee should be recommitted either for his or society's benefit. . . .
>
> The parole-release decision, however, is more subtle and depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience with

> the difficult and sensitive task of evaluating the advisability of parole release. [*Greenholtz*, 442 US at 9-10, quoting *Morrissey*, 408 US at 482.]

In Michigan, circuit court review of a Parole Board order is distinct from the decisions involved in parole revocation. As already articulated, during circuit court review the court is charged with determining whether the Board abused its discretion and complied with the applicable statutes and administrative regulations. Unlike revocation, the circuit court does not determine whether an inmate engaged in conduct sufficient to warrant reversal of the Board's order or whether the inmate violated terms of the parole. Moreover, during the circuit court review, unlike a parolee or probationer, Hill remained incarcerated and did not benefit from any of the liberties of a probationer or parolee. He was not at liberty to be "gainfully employed" or "free to be with family and friends" or to "form the other enduring attachments of normal life." *Greenholtz*, 442 US at 9. Instead, although Hill had the Board's order in hand, he remained an inmate, "confined and thus subject to all of the necessary restraints that inhere in a prison." *Id*. Similar to the inmate in *Jago* who had a parole order rescinded before release, and the inmate in *Haeger* who had his parole order challenged and reversed by the circuit court before release, Hill's expectation that the Board's order would be effectuated was legally insufficient to trigger a protected liberty interest.

In sum, given that an appeal to the circuit court is part of the parole process, an inmate's constitutional liberty interest is not triggered when the Board enters its order granting parole. Instead, such interest is triggered after the parole process has run its course and the inmate is released from prison. As applied in this case, Hill did not have a constitutionally protected

liberty interest when the Board granted him parole such that he was entitled to appointed counsel during the pendency of the prosecutor's appeal.

2. EQUAL PROTECTION

Hill also contends that he is entitled to the appointment of counsel under the Equal Protection Clause because indigent inmate appellees "remain ill equipped to represent themselves in the prosecutor's appeal of the Parole Board's decision to grant parole." Hill's argument appears to be based on MCR 7.118(D)(3)(b)(i), which allows a prisoner to respond to a prosecutor's appeal of a parole-release decision "through retained counsel or in propria persona." Thus, Hill appears to contend that the Equal Protection Clause demands appointment of counsel for an indigent prisoner responding to a prosecutor's appeal because a prisoner who can afford counsel is allowed to respond through counsel. See *People v Portillo*, 241 Mich App 540, 542; 616 NW2d 707 (2000) (recognizing that court rules, like statutes, are subject to challenges on equal protection grounds).

"Equal protection is guaranteed under the federal and state constitutions." *Morales*, 260 Mich App at 49. While the Equal Protection Clause "ensure[s] that people similarly situated will be treated alike," it "does not guarantee that people in different circumstances will be treated the same." *Id*. "Unless the discrimination impinges on the exercise of a fundamental right or involves a suspect class, the inquiry under the Equal Protection Clause is whether the classification is rationally related to a legitimate governmental purpose." *Id*. at 49-50 (quotation marks and citation omitted). Fundamental rights include due process in criminal matters. *In re Parole of Franciosi*, 231 Mich App 607, 613 n 5; 586 NW2d 542 (1998).

Hill cites *Douglas v California*, 372 US 353; 83 S Ct 814; 9 L Ed 2d 811 (1963) in support of his equal protection argument. In *Douglas*, the United States Supreme Court held that criminal defendants were entitled to appointed counsel during first appeals as of right. *Id*. at 357. In *Halbert v Michigan*, 545 US 605, 611; 125 S Ct 2582; 162 L Ed 2d 552 (2005), the Court explained:

> Two considerations were key to our decision in *Douglas* that a State is required to appoint counsel for an indigent defendant's first-tier appeal as of right. First, such an appeal entails an adjudication on the "merits." Second, first-tier review differs from subsequent appellate stages at which the claims have once been presented by [appellate counsel] and passed upon by an appellate court. [Quotation marks and citation omitted.]

None of the considerations at issue in *Douglas* are present in this case. In this case, Hill was not contesting his criminal conviction. Instead, he was a mere participant in the parole process, and he did not have a protected liberty interest in parole. Thus, *Douglas* is inapposite and not controlling in this case. Having so determined, we next address whether MCR 7.118(D)(3)(b)(i) compels the appointment of counsel under the Equal Protection Clause.

As explained, Hill did not have a due process liberty interest in this case. Therefore, a fundamental right is not at issue and strict scrutiny does not apply. *Morales*, 260 Mich App at 49-50. In addition, Hill, as a prison inmate, was not a member of a suspect class. *Id.* at 51. Therefore, the rational basis test applies. *Id*. Under the rational basis test, the challenged legislation "is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption." *People v Idziak*, 484 Mich 549, 570; 773 NW2d 616 (2009) (quotation marks and

citation omitted). Specifically, "[t]o prevail under this highly deferential standard of review, a challenger must show that the legislation is arbitrary and wholly unrelated in a rational way to the objective of the statute." *Id.* at 570-571 (quotation marks and citation omitted). "Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety,' or even whether it results in some inequity when put into practice." *Id.* (quotation marks and citation omitted). Rather, "[a] rational basis exists for the legislation when any set of facts, either known or that can be reasonably conceived, justifies the discrimination." *Morales*, 260 Mich App at 51. Such a finding may be based on "rational speculation unsupported by evidence or empirical data." *FCC v Beach Communications, Inc*, 508 US 307, 315; 113 S Ct 2096; 124 L Ed 2d 211 (1993). "[I]n other words, the challenger must 'negative *every conceivable basis* which might support' the legislation." *TIG Ins Co, Inc v Dep't of Treasury*, 464 Mich 548, 558; 629 NW2d 402 (2001), quoting *Lehnhausen v Lake Shore Auto Parts Co*, 410 US 356, 364; 93 S Ct 1001; 35 L Ed 2d 351 (1973) (emphasis added).

In this case, although MCR 7.118(D)(3)(b)(i) may result in some inequality when put into practice, Hill cannot "negate every conceivable basis" which might support the rationale underlying the court rule. *TIG Ins Co*, 464 Mich at 558. In particular, the rule preserves scarce court resources, which is a legitimate governmental purpose. See *Morales*, 260 Mich App at 52 (holding that precluding inmates from appealing Board denials of parole was rationally related to the legitimate governmental interest of preserving scarce public resources). Moreover, it is reasonably conceivable that the court rule does not require appointment of counsel for indigent inmates because, during many prosecutor appeals of parole release decisions, the Attorney General

appears on behalf of the Board and presents arguments that, in part, may advance the inmate's interests. As noted, a finding that legislation is rationally related to a legitimate governmental purpose may be based on "rational speculation unsupported by evidence or empirical data." *Beach Communications*, 508 US at 315.

Moreover, we note that a state need not level the economic playing field for indigent defendants in every instance:

> The [United States Supreme] Court has not guaranteed that all defendants will be able to present their defense or prosecute their appeals with equal resources, for it is incapable of leveling the economic ability of some defendants to pay for superior legal or investigative services that may be of some assistance to them. [4 Rotunda & Nowak, Constitutional Law (4th ed, 2012 Supp), § 18.41 p 897.]

In the context of indigent defendants and discretionary appeals, the Supreme Court has held that a state need not appoint counsel in every instance in which a wealthy defendant may be able to afford one: see e.g. *Halbert*, 545 US at 610, citing *Ross v Moffitt*, 417 US 600, 610-612, 615-618; 94 S Ct 2437; 41 L Ed 2d 341 (1974) ("[A] State need not appoint counsel to aid a poor person in discretionary appeals to the State's highest court, or in petitioning for review in [the United States Supreme] Court."); *Gagnon*, 411 US at 790 (holding that appointed counsel was not necessary at every probation-revocation proceeding, but rather should be determined on a case-by-case basis).

Thus, we conclude that the court rule does not violate the Equal Protection Clause because it is rationally related to a legitimate governmental purpose. *Morales*, 260 Mich App at 49-50.

In summary, the Board's order granting Hill parole did not trigger any protected due process liberty interest, and Hill was not entitled to appointed counsel under the Equal Protection Clause. Therefore, the circuit court was not compelled to appoint counsel for Hill during the pendency of the prosecutor's appeal to fulfill its constitutional responsibility. Having determined that the circuit court was not compelled to appoint counsel, we next address the issue of whether the circuit court had the inherent authority to appoint counsel.

C. CIRCUIT COURT'S AUTHORITY TO APPOINT COUNSEL

Hill argues that even if he did not have a constitutional right to appointed counsel, the circuit court nevertheless had the inherent authority to appoint counsel. Conversely, the prosecutor argues that the circuit court erred when it held that it had inherent authority to appoint counsel at public expense.

i. *CRAWFORD CO* IS NOT CONTROLLING

The prosecutor's central argument on this issue is that the power to appropriate public funds belongs to the Legislature, and that the circuit court's inherent authority to compel appropriations is strictly limited pursuant to *Crawford Co*, 476 Mich at 131.

In *Crawford Co*, the circuit court sought to compel counties to appropriate funding for enhanced pension and retiree health-care plans that it deemed necessary to recruit staff and allow it to carry out its judicial functions. *Id*. at 134. The circuit court maintained that the increased benefits were reasonable and necessary to allow it to perform its constitutional responsibilities. *Id*. The court reasoned that, absent the enhanced benefits

package, the resulting poor morale and reduced productivity of the employees would not allow the court to function properly. *Id*. at 138. This Court affirmed the circuit judge's order compelling the appropriations. *Id*. at 139. Our Supreme Court granted leave, and in an opinion by Justice MARKMAN,[5] reversed this Court. *Id*. at 135. Justice MARKMAN began by explaining that a core aspect of the Legislature's constitutional authority includes the power to tax and appropriate public funding. *Id*. at 141. However, Justice MARKMAN reasoned that in some instances, the judiciary has the power to compel funding to allow it to carry out its constitutional responsibilities:

> In order for the judicial branch to carry out its constitutional responsibilities . . . the judiciary cannot be totally beholden to legislative determinations regarding its budgets. While the people of this state have the right to appropriations and taxing decisions being made by their elected representatives in the legislative branch, they also have the right to a judiciary that is funded sufficiently to carry out its constitutional responsibilities.
>
> Thus, the judiciary's "inherent power" to compel appropriations sufficient to enable it to carry out its constitutional responsibilities is a function of the separation of powers provided for in the Michigan Constitution. [*Id*. at 143.]

Justice MARKMAN cautioned that the judiciary's inherent authority to compel appropriations is limited:

> However, in order to accommodate this distinctive, and extraordinary, judicial power with the normal primacy of the legislative branch in determining levels of appropriations, the "inherent power" has always been sharply circumscribed. The "inherent power" contemplates only the power, when an impasse has arisen between the legislative

[5] Justice MARKMAN was joined by Chief Justice TAYLOR and Justice YOUNG and a concurring opinion by Justice CORRIGAN, *Crawford Co*, 476 Mich at 161-162.

> and judicial branches, to determine levels of appropriation that are "reasonable and necessary" to enable the judiciary to carry out its constitutional responsibilities. [*Id*.]

Justice MARKMAN concluded that the circuit court failed to demonstrate by clear and convincing evidence that the enhanced benefit plan was "both 'reasonable and necessary' to allow that court to function serviceably in carrying out is constitutional responsibilities." *Id*. at 149-155.

The prosecutor's argument that *Crawford Co* controls the outcome of the case at bar is misplaced. The circuit court in this case did not compel its funding units to provide any additional appropriations so that it could appoint counsel for Hill. Instead, the circuit court utilized funds that had already been apportioned for purposes of appointing appellate counsel for indigent defendants. Unlike the circuit court in *Crawford Co*, which had attempted to compel additional funding, the circuit court in this case did not compel any additional appropriations from its funding units. In stark contrast to *Crawford Co*, this case calls on us to decide whether a circuit court possesses the inherent authority to allocate previously apportioned funds in a manner it deems best facilitates the fair and orderly disposition of its proceedings.

ii. THE CIRCUIT COURT HAD AUTHORITY TO APPOINT COUNSEL

MCR 7.118(D)(3)(b)(i) does not address whether a circuit court has the authority to appoint counsel for an indigent inmate responding to an appeal of a Parole Board decision. Specifically, MCR 7.118(D)(3)(b)(i) provides that an inmate "may respond to the [prosecutor's or the victim's] application for leave to appeal through retained counsel or in propria persona, although no response is required." Although MCR 7.118(D)(3)(b)(i)

is silent on the issue, we hold that because a circuit court has broad authority to facilitate the fair and orderly disposition of cases and controversies, it has discretion to appoint counsel for indigent inmates responding to an appeal of a Parole Board decision.

The state constitution vests judicial power "exclusively in one court of justice," Const 1963, art 6, § 1, and the circuit courts are a division of the state's "one court of justice." *Detroit Mayor v Michigan*, 228 Mich App 386; 413; 579 NW2d 378 (1998), aff'd in part, vacated in part on other grounds 460 Mich 590 (1999). Circuit courts possess inherent authority to " 'declare what the law is and to determine the rights of parties conformably thereto.' " *Johnson v Kramer Bros Freight Lines, Inc*, 357 Mich 254, 258; 98 NW2d 586 (1959), quoting 16 CJS, Constitutional Law, § 144, p 687. "In addition to such traditional adjudicative powers, the Michigan Supreme Court has long recognized that the judiciary possesses 'all the authority necessary to exercise its powers as a coordinate branch of government.' " *Detroit Mayor*, 228 Mich App at 411, quoting *In re 1976 PA 267*, 400 Mich 660, 663; 255 NW2d 635 (1977). Such powers, "have been exclusively entrusted to the judiciary by the Constitution and may not be diminished, exercised by, nor interfered with by the other branches of government without constitutional authorization." *In re 1976 PA 267*, 400 Mich at 663. A circuit court's inherent power "is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006); see also *People v Brown*, 238 Mich 298, 300; 212 NW 968 (1927) (stating that a circuit court has the inherent right to "function efficiently"). In addition to their inherent powers, circuit courts also have express statu-

tory authority to "direct and control the proceedings before them." *Maldonado*, 476 Mich at 376, citing MCL 600.611. Specifically, MCL 600.611 provides that, "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments."

Included within a court's inherent powers is the power to appoint counsel to represent indigent litigants to render justice in the face of exceptional circumstances. See 7A CJS, Attorney & Client, § 139, p. 126. In particular, our Supreme Court has previously recognized that on some occasions it is necessary to appoint appellate counsel for an indigent inmate during an appeal of a parole-release decision. In *In re Parole of Paquette*, 489 Mich 982; 799 NW2d 555 (2011), this Court denied the Parole Board's application for leave to appeal a circuit court order reversing the Board's decision to grant the defendant parole.[6] The Board applied for leave to appeal in our Supreme Court, and, in lieu of granting leave, our Supreme Court remanded the case to this Court for consideration as on leave granted. *Id*. In addition, our Supreme Court ordered the State Appellate Defender Office to act as counsel for the defendant "in the Court of Appeals and any subsequent proceeding in this Court." *Id*.

In this case the circuit court did not act outside the scope of its inherent authority when it appointed appellate counsel for Hill. As noted, a circuit court has broad authority to manage its own affairs in order to achieve "the orderly and expeditious disposition of cases." *Maldonado*, 476 Mich at 376. Further, a circuit court can "direct and control the proceedings before them" and make any order to

[6] *In re Parole of Paquette*, unpublished order of the Court of Appeals, entered February 10, 2011 (Docket No. 301140).

effectuate their jurisdiction. *Id*.; MCL 600.611. "An exercise of the court's inherent power may be disturbed only upon a finding that there has been a clear abuse of discretion." *Persichini v William Beaumont Hosp*, 238 Mich App 626, 642; 607 NW2d 100 (1999). An abuse of discretion occurs when a court's decision falls outside the range of "reasonable and principled outcome[s]." *Maldonado*, 476 Mich at 389. The circuit court in this case did not abuse its discretion by exercising its authority to appoint appellate counsel for Hill. Like our Supreme Court in *Paquette*, in this case the circuit court found that appointing appellate counsel to represent Hill was important for the administration of justice. While no single factor is outcome determinative when deciding whether to appoint counsel in such cases, in this case the circuit court noted that Hill was involved in a complex parole proceeding. The complexity of the parole proceeding required review of an extensive Department of Corrections file dating back to 1998 that included multiple reports. The appeal also required the circuit court to determine whether the Board adhered to the constitution, statutes, and a myriad of administrative rules and regulations. See *Elias*, 294 Mich App at 510-523. Moreover, this case involved an inmate who had a learning disability. It was therefore a reasonable and proper exercise of the circuit court's discretion to conclude that appointing appellate counsel would facilitate the efficient and fair administration of justice. Furthermore, the circuit court used funds that had been previously apportioned for purposes of appointing appellate counsel for indigent defendants. Accordingly, the circuit court did not abuse its discretion by determining that appointment of counsel for Hill was an appropriate way to utilize its funds.

V. CONCLUSIONS

A prosecutor's appeal of a parole-release decision is part of the parole process in Michigan, and an inmate's constitutional liberty interest is not triggered when the Board enters its order to grant parole. Instead, a liberty interest is triggered only after the Board's order is effectuated and the inmate is released from prison. In this case, Hill did not have a constitutionally protected liberty interest when the Board granted him parole that would have compelled the circuit court to appoint counsel during the pendency of the prosecutor's appeal. In addition, the circuit court was not compelled to appoint counsel under the Equal Protection Clause. However, the circuit court had the inherent authority to use funds that had already been appropriated to appoint counsel for Hill to facilitate the orderly and efficient disposition of the proceeding. While it is within the inherent authority of the circuit court to appoint counsel to indigent persons in prosecutor's appeals from the decisions of the Parole Board, neither the federal nor state constitutions compel a circuit court in such cases to appoint counsel. Rather, the circuit court possesses broad discretion to determine when an indigent inmate, in a prosecutor's appeal of a Parole Board's decision, should have appointed counsel. Therefore, the decision of whether to appoint counsel in a prosecutor's appeal of a Parole Board's decision shall be reviewed by this Court for an abuse of discretion. Having determined that the circuit court did not abuse its discretion in this case, we affirm.

Affirmed.

HOEKSTRA, P.J., and MARKEY, J., concurred with BORRELLO, J.

PEOPLE v PORTELLOS

Docket Nos. 301190 and 301333. Submitted November 6, 2012, at Detroit. Decided November 13, 2012, at 9:00 a.m.

A Wayne Circuit Court jury convicted Emily Portellos of second-degree murder, MCL 750.317, and first-degree child abuse, MCL 750.136b(2), for the death of her newborn child. Defendant, who was learning-disabled, gave birth at home without medical assistance, then wrapped the baby in a towel and placed it in a plastic bag next to her bed so her mother would not discover that she had been pregnant. Defendant's mother discovered defendant bleeding profusely and sent her by ambulance to the hospital, where a staff member notified the police about the birth. An investigating detective found the baby dead. The court, Daniel P. Ryan, J., sentenced defendant to 86 to 180 months' imprisonment for the child abuse conviction and, in a downward departure from the recommended minimum sentence range under the sentencing guidelines, 10 to 20 years' imprisonment for the murder conviction. Defendant appealed her convictions in Docket No. 301190, and the prosecution appealed her sentence for the murder conviction in Docket No. 301333.

The Court of Appeals *held*:

1. Sufficient evidence supported defendant's convictions of first-degree child abuse and second-degree murder because a reasonable juror could find that defendant intentionally took actions that caused the baby's death or knowingly took those actions with a wanton disregard of the risks. The elements of second-degree murder are (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. Malice includes the intent to kill, the intent to cause great bodily harm, or the intent to take an action whose natural tendency is to cause death or great bodily harm, wantonly and willfully disregarding that risk. A person is guilty of first-degree child abuse if the person knowingly or intentionally caused serious physical or serious mental harm to a child. A defendant must not only act, but must know that the act will cause serious physical harm. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to conclude that defendant knowingly or

intentionally harmed the baby. Defendant hid her pregnancy from her mother and told others that she was afraid that her mother would find out about it. Defendant was trained in first aid, CPR, and sudden infant death syndrome, had read books on labor and delivery, and decided to give birth at home unassisted. Defendant had a cellular phone, but did not call for assistance after determining that the baby was being born breech or after the baby did not cry or move upon being born, although she called her supervisor and coworkers to explain her absence from work. Defendant wrapped the baby tightly in a towel, then placed the baby in a garbage bag. On the basis of these facts, a reasonable juror could conclude that defendant had intentionally smothered the baby so that defendant's mother would not hear the baby cry; could alternatively conclude that the baby died because defendant failed to summon medical assistance, wrapped the baby tightly in a towel, or placed the baby in a garbage bag; and could reasonably infer that defendant knew that the natural and probable consequence of those actions included death or serious injury to the baby. Defendant's argument that her fear of her mother's response to her pregnancy negated the evidence of malice was unsupported by legal authority.

2. The trial court improperly assessed zero points for offense variable (OV) 3, MCL 777.33, which is scored when a victim was physically injured. Zero points are to be assessed if no physical injury occurred to a victim. Because the victim in this case was killed, the trial court was required to assess 25 points unless a higher score applied, which it did not.

3. The trial court did not clearly err by assessing zero points for OV 5, MCL 777.35, which is scored if serious psychological injury requiring professional treatment occurred to a victim's family. Neither the victim's father nor her grandmother, both of whom spoke at the sentencing hearing, expressed an intention to receive professional treatment for psychological injuries. The trial court did not clearly err by determining that they did not necessarily require professional treatment.

4. The trial court did not clearly err by assessing zero points for OV 19, MCL 777.49, which is scored, among other reasons, if the defendant interfered with the administration of justice or the rendering of emergency services. Under OV 19, the court must assess 15 points if the offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services, MCL 777.49(b); 10 points if the offender

otherwise interfered with or attempted to interfere with the administration of justice, MCL 777.49(c); and zero points if the offender did not threaten the security of a penal institution or court or interfere with the administration of justice or the rendering of emergency services by force or threat of force, MCL 777.49(d). Although lying to law enforcement officers or private persons who are authorized to investigate a crime may constitute otherwise interfering with the administration of justice under MCL 777.49(c), that provision, unlike others in MCL 777.49, does not refer to otherwise interfering with emergency services, and the Legislature's inclusion of language in one part of a statute that it omits in another is assumed to be intentional. The trial court's conclusion that defendant had not otherwise interfered with or attempted to interfere with the administration of justice under MCL 777.49(c) by initially telling a detective that she had had a miscarriage or stillbirth was not clearly erroneous because it was supported by evidence that defendant was in postoperative recovery suffering the effects of general anesthesia and blood loss at the time.

5. Adding 25 points to defendant's OV increased her OV level. Because the trial court's scoring error affected the recommended minimum sentence range, resentencing was required.

6. The trial court did not abuse its discretion by departing downward from the recommended minimum sentence range with respect to defendant's second-degree-murder conviction because its decision to do so was based on objective and verifiable factors that were supported by the evidence, including defendant's strong family and community support, lack of criminal record, age, exemplary work record, good behavior while incarcerated, cooperation with the police, and learning disability. However, resentencing was required because the trial court improperly scored OV 3, and the trial court was directed to determine on remand whether its specific departure remained proportionate in light of the new recommended minimum sentence range.

Convictions affirmed; sentence for second-degree murder vacated; case remanded for resentencing.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 19 — INTERFERENCE WITH ADMINISTRATION OF JUSTICE OR RENDERING OF EMERGENCY SERVICES.

Offense variable (OV) 19, MCL 777.49, is scored, among other reasons, if the defendant interfered with the administration of justice or the rendering of emergency services; under OV 19, the court (1) must assess 15 points under MCL 777.49(b) if the offender used force or the threat of force against another person or

> the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services, (2) must assess 10 points under MCL 777.49(c) if the offender otherwise interfered with or attempted to interfere with the administration of justice, and (3) must assess zero points under MCL 777.49(d) if the offender did not threaten the security of a penal institution or court or interfere with the administration of justice or the rendering of emergency services by force or threat of force; lying to emergency-services personnel does not constitute otherwise interfering with the administration of justice under MCL 777.49(c).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Ana I. Quiroz*, Assistant Prosecuting Attorney, for the people.

Daniel J. Rust for defendant.

Before: MURPHY, C.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM. In these consolidated appeals, defendant, Emily Portellos, appeals as of right her convictions, following a jury trial, of second-degree murder[1] and first-degree child abuse.[2] The trial court sentenced Portellos to serve 86 to 180 months' imprisonment for her child abuse conviction and 10 to 20 years' imprisonment for her second-degree-murder conviction. The trial court departed downward from the sentencing guidelines' recommended minimum sentence range for the second-degree-murder conviction. The prosecution appeals as of right the trial court's downward departure from the sentencing guidelines and its scoring of offense variables (OVs) 3, 5, and 19. We affirm Portellos's

[1] MCL 750.317.

[2] MCL 750.136b(2).

convictions, but vacate Portellos's sentence for second-degree murder and remand for resentencing.

I. FACTS

This case arises out of the tragic death of Baby Portellos, a newborn, during the early morning hours of October 14, 2008.

A. BACKGROUND FACTS

At the time of the baby's birth, Portellos was 28 years old and lived with her mother and brother. Marianne Wright, Portellos's special-education teacher, testified that Portellos was learning-disabled and required extra time to process information, but was not mentally retarded. Wright testified that although Portellos would work well in routine environments, she would not perform well when making quick decisions and judgments.

Portellos worked at a childcare center in Livonia starting in 2004. Kimberly Avendt, the director of the center, testified that Portellos was very good with children and was trustworthy. Avendt testified that Portellos had completed coursework in child development and was waiting for her associate's degree certificate. Avendt testified that Portellos was trained in first aid, CPR, and sudden infant death syndrome. Susan Ianitelli, Portellos's coworker, testified that Portellos was able to handle the paperwork associated with the job after Ianitelli taught her how.

Portellos previously gave birth in 2006. In December of that year, Portellos became ill with sharp abdominal pains. Portellos saw her family doctor, Dr. Muhammed Wasiullah. He examined Portellos and suspected that she might be pregnant. Wasiullah observed that Portel-

los's entire abdomen was swollen, but she did not have a "baby bump." He did not suspect that she was in the final stages of pregnancy. Wasiullah sent Portellos to the emergency room, where she gave birth. Mary Portellos, Portellos's mother, testified that she was shocked that Portellos gave birth. Portellos placed the baby for adoption. Portellos missed six weeks' work, and she explained to coworkers that a cyst had enlarged her abdomen.

In the summer of 2008, a coworker patted Portellos's abdomen and asked if Portellos had "anything to tell." Portellos denied that she was pregnant. Ianitelli advised Portellos to seek medical treatment because she might have another cyst. In July 2008, Mary Portellos and an aunt both saw Portellos undressed, but did not realize she was pregnant. Demetra Christos (a friend of the family) and Marilyn Murphy (the baby's paternal grandmother) testified that they saw Portellos in September and October 2008 at family gatherings, but Portellos did not appear pregnant.

B. FACTS SURROUNDING BABY PORTELLOS'S DEATH

On the morning of October 14, 2008, Mary Portellos woke at about 6:00 or 7:00 a.m. and called out to Portellos that it was time to get ready for work. Portellos told her that she was ill and could not go to work. Mary Portellos went back to sleep. Avendt testified that around 8:00 a.m., Portellos called her and said that she was sick with food poisoning. Another coworker, Erica Bishop, testified that Portellos called her and said she was sick with bad cramps and intended to go the hospital. Ianitelli testified that she was concerned and exchanged text messages. Portellos informed Ianitelli that she was bleeding and was "going to die."

Mary Portellos woke again at about 10:30 or 11:00 a.m. and went to Portellos's room to check on her. She saw that Portellos was pale and weak and that there was a large quantity of blood on the bed and the floor. Portellos told Mary Portellos that she was having a bad menstrual cycle. Mary Portellos insisted that she go to the emergency room. Portellos fainted in the hallway, and Mary Portellos called for an ambulance. Mary Portellos testified that Portellos was going in and out of consciousness, but when emergency medical services arrived, she heard Portellos tell the technician that she was not pregnant.

Dr. Michael Prescott, the emergency room physician, testified that when Portellos arrived, he was alarmed because she was bleeding copiously. Prescott acknowledged that Portellos's blood loss, heart rate, and outward signs were consistent with hemorrhagic shock. He tested Portellos for pregnancy, and the test was positive. He suspected that Portellos was having a miscarriage. Portellos asked Prescott not to discuss her condition with her mother, but Mary Portellos had been present when the pregnancy test showed a positive result. Prescott called the on-call obstetrician-gynecologist, Dr. Shari Maxwell.

Maxwell testified that Portellos was hemorrhaging and that her situation was life-threatening. Maxwell testified that Portellos was in too much pain to cooperate with an examination. When Maxwell asked Portellos to consent to anesthesia, Portellos responded by asking Maxwell not to discuss her condition with Mary Portellos. Portellos eventually signed the consent form. Maxwell operated on Portellos, removed a placenta that remained in Portellos's uterus, and stopped the bleeding. Rachel Pagden, a clinical therapist employed by the hospital, notified the Plymouth Township Police De-

partment that Portellos had received postdelivery treatment but the status of the baby was unknown.

Detective Mary Linton testified that she spoke with Portellos at the hospital after Portellos came out of anesthesia. Pagden was also present. Portellos initially told Linton that she had miscarried. Linton testified that she told Portellos that she knew Portellos had given birth, but Portellos would not admit that she had until Linton agreed not to tell Mary Portellos. Portellos told Linton that she did not want her mother to know about the baby because her mother would kill her. After Linton agreed not to tell Portellos's mother, Portellos informed her that she had given birth, but the baby was stillborn.

Portellos told Linton that she went into labor at around 1:00 a.m., gave birth at about 3:00 a.m., and that the baby was born feet first. Portellos told Linton that the baby had gasped for breath and lay still and that it did not cry. Portellos told Pagden that she was afraid that her mother would hear the baby crying. When asked whether the baby had been breathing, Portellos would only say that it "maybe gasped." Portellos told Linton that she wrapped the baby in towels or sheets and put it in a garbage bag next to her bed. Pagden and Linton testified that they did not ask Portellos how much time had passed between when the baby was born and when Portellos put it in the bag or whether the baby was alive when Portellos put it in the bag.

Portellos told Linton that she read books on labor and childbirth and that she intended to leave the baby at the fire department so that her mother would not find out. Portellos repeatedly informed Linton that she would return home and "bring the baby to you guys."

Plymouth Township Police searched Portellos's room. Officers found the baby inside a garbage bag next to Portellos's bed. One of the officers testified that the bag was open and that he could see a baby inside. Another officer testified that the bag was shut and that he could see a rose-colored towel in the bag. This officer further testified that the baby had been wrapped very tightly in the towel. She was pronounced dead at the scene.

Valerie Lundgren, a labor and delivery nurse at St. Mary Mercy Hospital, testified that she worked the evening of October 15, 2008, and that she checked on Portellos while making her rounds. Lundgren testified that when she asked Portellos if she had a support system, Portellos told her that she intended to take the baby to the fire department and place it for adoption and that she "intended to sneak it out to the fire station in a bag or garbage bag[.]" Lundgren testified that she had to explain that that rule only applied to living children.

Deborah Answorth, the nursing director of the birthing center at St. Mary, testified that she spoke with Portellos on the morning of October 15 at the hospital. Portellos told Answorth that she thought that she might have been pregnant for two weeks. Portellos told Answorth that she did not want her mother to know that she was pregnant.

Answorth testified that Portellos told her that she delivered the baby feet first and that it moved but did not cry. She testified that Portellos told her that she cut the baby's umbilical cord and that a lot of blood came out. She testified that Portellos told her that "after a time she thought the baby was not alive and then put it in . . . a bag next to the bed." Answorth testified that Portellos said she placed the baby in the bag a few hours after it was born.

Answorth testified that doctors always deliver a baby in a breech position by cesarean section because these deliveries are dangerous and breech babies often need to be resuscitated after birth. She testified that normally a person clamps the umbilical cord with two clamps and cuts between the clamps to minimize bleeding and that incidents in which the umbilical cord broke during delivery were medical emergencies because the mother and baby would both bleed excessively. Answorth testified that after 5 or 10 minutes of bleeding through the cord, the baby would start to suffer from heart rate and respiration problems.

Dr. Cheryl Loewe, the Wayne County Deputy Chief Medical Examiner, performed an autopsy on the baby. Loewe testified that the baby was born full term and that her lung tissues contained air, which indicated that she took at least one breath. Loewe testified that the baby showed no signs of drugs, alcohol, disease, or defects. She testified that if the baby had been born with medical supervision, she would have survived. Loewe testified that she studied the baby's tissues and did not believe that she had bled to death.

Loewe testified that she concluded that Baby Portellos's cause of death was asphyxia by smothering and that the circumstances surrounding the baby's death indicated that it was a homicide. Loewe testified that it is extremely easy to smother a newborn and that the baby's airways had been clear. She testified that wrapping a baby tightly in a towel or sealing it in a plastic bag would be enough to smother it. Linton opined that Portellos smothered the baby so that her mother would not hear the baby cry.

The prosecution charged Portellos with first-degree child abuse; first-degree premeditated murder, including the lesser offenses of second-degree murder and

voluntary manslaughter; and first-degree felony murder with first-degree child abuse as the underlying felony. The trial court instructed the jury that to convict Portellos of first-degree child abuse, it must find that Portellos "knowingly or intentionally caused serious physical harm . . . to Baby Portellos. By serious physical harm, I mean any physical injury to a child that seriously impairs the child's health or physical well-being . . . ." The trial court instructed the jury that it could convict Portellos of second-degree murder if it found that she (1) intended to kill, (2) intended to do great bodily harm to, or (3) took actions and knowingly created a very high risk of death or great bodily harm to Baby Portellos. The jury found Portellos guilty of first-degree child abuse and second-degree murder and acquitted Portellos of first-degree premeditated murder and first-degree felony murder.

C. SENTENCING

The prosecution argued for the trial court to assess 25 points for OV 3 (physical injury to the victim)[3] because Portellos inflicted a life-threatening or fatal injury on the baby. The trial assessed zero points for OV 3 because the jury might have found that Baby Portellos died from a lack of medical care on the basis of the conflicting evidence surrounding the baby's death.

The prosecution argued for the trial court to assess 10 points for OV 5 (psychological injury to a member of the victim's family)[4] because Murphy submitted a letter that spoke about her disbelief, grief, anger, and heartbreak at the loss of Baby Portellos. Counsel for Portellos argued that Murphy's letter reflected a normal grieving process

[3] MCL 777.33.

[4] MCL 777.35.

and there was no evidence that Murphy sought or required counseling. Murphy addressed the court at sentencing and stated that she hoped that Portellos could receive the counseling that she would need. The trial court assessed zero points for OV 5 because of the lack of evidence that the victim's family required counseling.

The prosecution argued for the trial court to assess 10 points for OV 19 (interference with the administration of justice)[5] because Portellos lied that she was not pregnant and it wasted police and medical resources. Counsel for Portellos argued that Portellos was literally bleeding to death or recovering from anesthesia when she was initially questioned and that she cooperated with Linton. The trial court found that Portellos had not used force against or fled from medical responders and that "some act other than conduct" did not apply under the circumstances of the case. The trial court assessed zero points for OV 19.

The sentencing information report as scored by the trial court resulted in a recommended minimum sentencing range of 162 to 270 months for the second-degree-murder conviction. The trial court found several substantial and compelling reasons to depart downward from the sentencing guidelines range and determined that a sentence of 10 to 20 years' (120 to 240 months') imprisonment was more proportionate to Portellos's crime.

II. SUFFICIENCY OF THE EVIDENCE

In Docket No. 301333, Portellos argues that there was insufficient evidence of her state of mind to support the jury's verdict on second-degree murder and first-degree child abuse because there was no evidence that Portellos intended to harm or kill her baby.

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[5] MCL 777.49.

A. STANDARD OF REVIEW

A claim that the evidence was insufficient to convict a defendant invokes that defendant's constitutional right to due process of law.[6] This Court reviews de novo the sufficiency of the evidence on appeal.[7] When reviewing a challenge to the sufficiency of the evidence, we review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.[8]

B. LEGAL STANDARDS

The elements of second-degree murder are "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse."[9] Malice includes the intent to kill, the intent to cause great bodily harm, or the intent to take an action whose natural tendency is to cause death or great bodily harm, wantonly and willfully disregarding that risk.[10]

"Voluntary manslaughter is an intentional killing committed under the influence of passion or hot blood produced by adequate provocation and before a reasonable time has passed for the blood to cool."[11] Provocation is necessary to negate the presence of malice.[12]

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[6] *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992); *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

[7] *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

[8] *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005); *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

[9] *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998).

[10] *Id*. at 464.

[11] *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995).

[12] See *Reese*, 491 Mich at 144; *People v Mendoza*, 468 Mich 527, 535-536; 664 NW2d 685 (2003).

"A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child."[13] A defendant must not only act, but must know that the act will cause serious physical harm.[14]

"Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of a crime."[15] Minimal circumstantial evidence is sufficient to prove the defendant's state of mind.[16]

C. APPLYING THE STANDARDS

Portellos argues that there was insufficient evidence of malice to support her first-degree child abuse and second-degree murder convictions because she did not knowingly or intentionally harm baby Portellos. We disagree.

We conclude that sufficient evidence supported the jury's verdicts of second-degree murder and first-degree child abuse. Viewing the evidence in the light most favorable to the prosecution, Portellos was trained in first aid, CPR, and sudden infant death syndrome. Portellos knew she was pregnant for a few weeks. She hid her pregnancy from her mother and told witnesses that she was afraid that her mother would find out about the pregnancy. Portellos read books on labor and delivery and decided to give birth to her baby at home, unassisted. Portellos had a cellular phone. Even after determining that the baby was being born breech, Portellos did not call for assistance. However, Portellos

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[13] MCL 750.136b(2).

[14] *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004).

[15] *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003).

[16] *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

had the presence of mind to call her supervisor and coworkers to explain her absence at work. And even after the baby did not cry when she was born, but only gasped a little and did not move, Portellos still did not call for medical assistance. She instead wrapped the baby tightly in a towel. Portellos then placed the baby in a garbage bag.

Portellos argues that evidence of provocation negated the evidence of malice in this case, because she was alarmed that the unexpected birth of a baby would enrage her mother and cause serious repercussions. Portellos does not provide any authority to support the proposition that an unexpected birth or the fear of another person are the types of "adequate provocation" contemplated by the law governing voluntary manslaughter. Parties may not "merely announce their position and leave it to this Court to discover and rationalize the basis for their claims," and we may consider unsupported issues abandoned.[17] We conclude that Portellos has abandoned this issue.

On the basis of the facts in this case, a reasonable juror could conclude that Portellos intentionally smothered Baby Portellos so that Mary Portellos would not hear the baby cry. A reasonable juror could alternatively conclude that the baby died (1) because Portellos failed to summon medical assistance, (2) from being wrapped tightly in a towel, or (3) from being placed in the garbage bag. A reasonable juror could infer from these facts that Portellos knew that the natural and probable consequence of those actions included death or serious injury to Baby Portellos. We conclude that sufficient evidence supports Portellos's convictions of first-degree child abuse and second-degree murder because a rea-

[17] *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 633; 752 NW2d 479 (2008).

sonable juror could find that Portellos intentionally took actions that caused the baby's death or knowingly took those actions with a wanton disregard of the risks.

III. SENTENCING

In Docket No. 301190, the prosecution argues that the trial court improperly scored OVs 3, 5, and 19 and that the trial court abused its discretion when it departed downward from the sentencing guidelines.

A. THE TRIAL COURT'S SENTENCING GUIDELINES SCORES

1. STANDARD OF REVIEW

The proper interpretation and application of the sentencing guidelines is a question of law that this Court reviews de novo.[18] We review the sentencing court's scoring of a sentencing guidelines variable for clear error.[19] A scoring decision is not clearly erroneous if the record contains any evidence supporting the decision.[20]

2. PHYSICAL INJURY UNDER OV 3

The prosecution argues that the trial court improperly assessed zero points for OV 3. We agree.

Offense variable 3 is scored when a victim was physically injured:

> (1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) A victim was killed ..... 100 points

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[18] *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

[19] *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012).

[20] *Id*.

> (b) A victim was killed ..... 50 points
>
> (c) Life threatening or permanent incapacitating injury occurred to a victim ..... 25 points
>
> * * *
>
> (f) No physical injury occurred to a victim ..... 0 points[21]

However, the trial court may not assess 100 points for OV 3 if homicide is the sentencing offense.[22] Nor may the trial court assess 50 points for OV 3 unless a motor vehicle is involved.[23] But the trial court may not assess zero points for OV 3 if the defendant is convicted of a homicide offense and the victim is killed.[24] If the victim is killed, the trial court must assign 25 points unless a higher score applies.[25]

In this case, the trial court sentenced Portellos for second-degree murder. Second-degree murder is a homicide offense.[26] Thus, the trial court could not assign 100 points for OV 3. It could not assign 50 points because there was no motor vehicle involved. The next highest possible score was 25 points.

The parties do not dispute that the victim died. The trial court declined to assess 25 points for OV 3 because of the conflicting evidence surrounding the baby's manner of death—whether she died from birth trauma, improper cutting of the umbilical cord, or smothering. But nothing in the language of OV 3 addresses how the injury that killed the victim occurred.[27] The trial court

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[21] MCL 777.33.

[22] MCL 777.33(2)(b); *People v Houston*, 473 Mich 399, 405; 702 NW2d 530 (2005); *People v Laidler*, 491 Mich 339, 343; 817 NW2d 517 (2012).

[23] MCL 777.33(2)(c); *People v Hindman*, 472 Mich 875, 876 (2005).

[24] *Houston*, 473 Mich at 405-406.

[25] *Id*. at 407.

[26] See *id*. at 405, 407.

[27] See MCL 777.33.

must assign 25 points if a life-threatening or permanent incapacitating injury occurred to a victim.[28] An injury that actually causes death is a life-threatening injury for purposes of OV 3.[29] With respect to the provisions of OV 3 that directly require a causal link to support a given score, the defendant's conduct need not be the sole cause of the victim's death.[30] We conclude that when the trial court determines whether it must assign 25 points because the defendant caused the victim's death, it should do so in the same manner as it determines whether the defendant caused the victim's death under those provisions. Thus, the question is whether, but for the defendant's conduct, the victim's death would have occurred.[31] The defendant's conduct need not be the *sole* cause of the victim's death.[32]

In this case, but for Portellos's conduct, the baby would not have died. The conditions surrounding the baby's birth certainly contributed to her death. And that the jury found Portellos guilty of first-degree child abuse and second-degree murder indicates that Portellos was accountable for her death. We conclude that the trial court erred when it assessed zero points for OV 3. The trial court properly should have assessed 25 points.

3. PSYCHOLOGICAL INJURY UNDER OV 5

The prosecution argues that the trial court erred when it assessed zero points for OV 5 and that it should have assessed 15 points. We disagree.

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[28] MCL 777.33(1)(c).

[29] See *Houston*, 473 Mich at 407 n 16.

[30] See *Laidler*, 491 Mich at 344-346 (addressing MCL 777.33(2)(b), which requires a score of 100 points for a death that "results" from a crime).

[31] See *id*. at 345.

[32] See *id*. at 346.

The trial court must assess 15 points for OV 5 if "[s]erious psychological injury requiring professional treatment occurred to a victim's family."[33] The trial court must assess zero points for OV 5 if "[n]o serious psychological injury requiring professional treatment occurred to a victim's family."[34] Whether a victim has in fact sought treatment is not determinative.[35]

In this case, the prosecution argued that Marilyn Murphy (the baby's paternal grandmother) and Robert Murphy (the baby's father) suffered serious psychological injuries that might require treatment. However, both Marilyn and Robert Murphy spoke at the sentencing hearing. Though Marilyn Murphy expressed her emotional response to the baby's death, she did not state that she intended to receive treatment. Nor did Robert Murphy state that he intended to receive treatment. Marilyn Murphy only stated that she hoped that Portellos would be able to receive treatment while in prison. We conclude that the trial court did not clearly err when it determined that the Murphys did not necessarily require professional treatment.

4. INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE UNDER OV 19

The prosecution argues that the trial court erred when it assessed zero points for OV 19 and that it instead should have assessed 10 points. The prosecution argues that the trial court improperly interpreted OV 19 as having a limited scope. We disagree.

The trial court should score OV 19 if, among other things, the defendant "interfere[d] with the administra-

[33] MCL 777.35(1)(a).

[34] MCL 777.35(1)(b).

[35] MCL 777.35(2).

tion of justice or the rendering of emergency services."[36] This offense variable, MCL 777.49, provides in part that the trial court should assess points when the following occur:

> (b) The offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services ..... 15 points
>
> (c) The offender otherwise interfered with or attempted to interfere with the administration of justice ... 10 points
>
> (d) The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice or the rendering of emergency services by force or threat of force ..... 0 points

Lying to law enforcement officers or private persons who are authorized to investigate a crime may constitute interference with their investigatory function, which is interference with the administration of justice under MCL 777.49(c).[37]

The prosecution argues that Portellos lied to medical personnel, which otherwise interfered with the provision of emergency services. However, MCL 777.49(c) does not contain any reference to otherwise interfering with emergency services. If the plain and ordinary meaning of a statute's language is clear, we will not engage in judicial construction.[38] When the Legislature includes language in one part of a statute that it omits in another, we assume that the omission was intentional.[39] Interference with emergency services is men-

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[36] MCL 777.49.

[37] *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004); *People v Passage*, 277 Mich App 175, 180; 743 NW2d 746 (2007).

[38] *People v Breidenbach*, 489 Mich 1, 8; 798 NW2d 738 (2011).

[39] *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011).

tioned several other times throughout MCL 777.49, but it is not included in MCL 777.49(c). MCL 777.49(c) is the only part of OV 19 that includes other conduct, such as deceit. We conclude that had our Legislature wished the trial court to assess 10 points under OV 19 for otherwise interfering with the rendering of emergency services, it clearly would have included language to reach that result. The trial court correctly determined that it should not assign 10 points for OV 19 for lying to medical services personnel.

The trial court also considered whether Portellos otherwise interfered with or attempted to interfere with the administration of justice under MCL 777.49(c), and it concluded that MCL 777.49(c) did not apply to the facts of this case. The prosecution argued that Portellos originally told Linton that she had had a miscarriage or stillbirth before telling her the truth. Portellos argued that she told Linton the location of the baby within minutes and had otherwise cooperated with questioning.

The trial court determined that the "delay would be attributable to the fact that she was in [postoperative recovery] . . . [s]uffering the effects of anesthesia." Pagden testified that Portellos was oriented with respect to time, person, and place and was not still "loopy," but also testified that Portellos had frequently repeated herself and did not appear to understand the severity of her behavior. Answorth also testified that later that morning, Portellos still had difficulty focusing and that she might attribute Portellos's condition to blood loss. Dr. Philip Wolok, Portellos's anesthesiologist, testified that he would have recommended against Portellos's discussing legal issues or signing legal documents for 24 hours after receiving general anesthesia because patients who have recently had general anes-

thesia might be lucid but impaired. We conclude that the trial court's determination that Portellos did not interfere with the administration of justice was not clearly erroneous because there was evidence to support its decision.

5. RESENTENCING IS REQUIRED

Adding 25 points to Portellos's OV score increases it from 35 points to 60 points, and increases her OV level with respect to the second-degree murder conviction from level I to level II.[40] If a mistaken score affects the defendant's recommended minimum sentence range, we should remand for resentencing.[41] Because the trial court's scoring error affected the appropriate guidelines range, we must vacate Portellos's sentence for this conviction and remand for resentencing.

B. THE TRIAL COURT'S DEPARTURE FROM THE SENTENCING GUIDELINES

1. STANDARD OF REVIEW

When reviewing a trial court's grounds for departing from the sentencing guidelines, this Court reviews for clear error the trial court's factual finding that a particular factor supporting the departure exists.[42] A finding is not clearly erroneous if there is any evidence to support it.[43]

We review de novo whether a factor is objective and verifiable.[44] We review for an abuse of discretion the trial court's determination that the factors in a particu-

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[40] MCL 777.16p; MCL 777.61.

[41] See *People v Francisco*, 474 Mich 82, 89-90; 711 NW2d 44 (2006).

[42] *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003).

[43] *Lockett*, 295 Mich App at 182.

[44] *Babcock*, 469 Mich at 264.

lar case are substantial and compelling reasons to depart from the guidelines and also review for an abuse of discretion the degree of the trial court's departure.[45] An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes.[46]

2. LEGAL STANDARDS

Our Legislature has enacted sentencing guidelines.[47] A trial court may depart from the appropriate guidelines range only if it states on the record substantial and compelling reasons for the departure and the facts that support those reasons are objective and verifiable, keenly grab our attention, and are of "considerable worth" when determining a sentence.[48] Facts are objective and verifiable when they are actions or occurrences external to the mind and are capable of being confirmed.[49]

Further, the trial court's departure must be proportionate to the defendant's conduct and criminal history.[50] The trial court must justify the particular departure it made by explaining "why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been."[51] The trial court may justify its departure by comparing the facts of the defendant's case against the sentencing grid to explain why its sentence is more proportionate.[52]

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[45] *Id*. at 264-265; *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

[46] *Babcock*, 469 Mich at 269.

[47] MCL 769.34.

[48] MCL 769.34(3); *Babcock*, 469 Mich at 257, 272 (citation and quotation marks omitted).

[49] *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

[50] *Smith*, 482 Mich at 300.

[51] *Id*. at 304.

[52] *Id*. at 306, 309-310.

3. APPLYING THE STANDARDS

The prosecution argues that the trial court clearly erred in certain factual findings during sentencing and abused its discretion by departing downward from the sentencing guidelines with respect to the second-degree-murder conviction because its reasons for doing so were not objective and verifiable and were not substantial and compelling. We disagree.

The trial court's several reasons for departing downward from the sentencing guidelines' recommended minimum sentence range included the following: (1) Portellos's strong family and community support, (2) that Portellos had no prior criminal record, was 30 years old, had a solid job history as an exemplary employee, and did not require any disciplinary actions while incarcerated, (3) that Portellos cooperated with the police, and (4) that Portellos was learning disabled and did not make good decisions under pressure.

The prosecution argues that the trial court improperly considered that Portellos cooperated with law enforcement. A defendant's cooperation with law enforcement is objective and verifiable.[53] As we stated earlier, the trial court's finding that Portellos cooperated with police was supported by the record evidence and was not clearly erroneous.

The prosecution argues that the ability of the victim's family to forgive the defendant is not objective and verifiable because it is similar to a defendant's lack of remorse. However, the Michigan Supreme Court has held that a defendant's strong family and community support is an objective and verifiable factor that may "weigh[] heavily in favor of a deviation from the statu-

[53] *People v Daniel*, 462 Mich 1, 7; 609 NW2d 557 (2000).

tory minimum."[54] Unlike a defendant's remorse, whether a defendant has family and community support is external to the mind and capable of being confirmed. In this case, there was evidence that Portellos did not have a supportive mother. But the trial court determined that Portellos's strong family and community support was demonstrated by the numerous letters of support that it received. We conclude that the trial court's finding was not clearly erroneous because it was supported by evidence.

The mitigating circumstances surrounding the offense and the defendant's criminal record, work history, and age are also objective and verifiable factors that the trial court may consider.[55] Though the defendant's lack of criminal record alone is not a substantial and compelling factor,[56] it may become a substantial and compelling factor when considered in conjunction with the defendant's age and other history.[57] In this case, the trial court considered Portellos's lack of a criminal record in conjunction with other factors. The trial court found that Portellos was 30 years old, had no prior record, had no disciplinary actions while awaiting trial and sentencing, and had attained and maintained steady employment, promotions, and an associate's degree despite her learning disability. These findings were not clearly erroneous because they were supported by the testimony of witnesses at trial.

Finally, the prosecution argues that the trial court's finding that Portellos's learning disability diminished her ability to make decisions was clearly erroneous. The

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[54] *People v Fields*, 448 Mich 58, 78-79; 528 NW2d 176 (1995); see also *People v Shinholster*, 196 Mich App 531, 535; 493 NW2d 502 (1992).

[55] *Daniel*, 462 Mich at 7; *Fields*, 448 Mich at 80.

[56] *People v Young*, 276 Mich App 446, 455-456; 740 NW2d 347 (2007).

[57] See *id*. at 456 n 1; *Daniel*, 462 Mich at 7.

trial court's finding that Portellos had a learning disability was supported by the testimony of Wright, her special-education teacher. Wright testified that Portellos was learning-disabled, that she required extra time to process information, and that she did not perform well when making quick decisions and judgments. We conclude that the trial court's determinations on these factors were not clearly erroneous because record evidence supported them.

Therefore, the factors the trial court considered were objective and verifiable and supported by the evidence. The unusual factual circumstances of this case keenly grabbed the trial court's attention; it noted that the circumstances of this case were far from typical for second-degree-murder cases. Further, these factors were of considerable worth because they might indicate Portellos's potential for rehabilitation.[58] We conclude that the trial court did not abuse its discretion when it determined that these reasons were substantial and compelling reasons to depart downward from the guidelines in this case. The trial court's outcome did not fall outside the range of reasonable and principled outcomes, which changed the guidelines' recommended minimum sentence range for the second-degree-murder conviction.

However, resentencing is required because the trial court improperly scored OV 3, which changed the guidelines' recommended minimum sentence range for the second-degree-murder conviction.[59] When it departed from the sentencing guidelines, the trial court properly justified the proportionality of its sentence by comparing it to the sentencing grid. On resentencing, the trial court should determine whether its specific

[58] See *Fields*, 448 Mich at 78.

[59] See MCL 777.16p; MCL 777.61.

departure remains proportionate in light of the sentence recommended by the guidelines.

We affirm Portellos's convictions of first-degree child abuse and second-degree murder. We vacate Portellos's sentence for second-degree murder and remand for resentencing by the sentencing judge, Judge Daniel Patrick Ryan. We do not retain jurisdiction.

MURPHY, C.J., and O'CONNELL and WHITBECK, JJ., concurred.

PEOPLE v COLLINS

Docket No. 305238. Submitted October 2, 2012, at Detroit. Decided November 15, 2012, at 9:00 a.m. Leave to appeal sought.

Jesse A. Collins was convicted by a jury in the Oakland Circuit Court of delivery of 50 grams or more, but less than 450 grams, of heroin, MCL 333.7401(2)(a)(*iii*), possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*), possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), and conspiracy to deliver and/or possess with intent to deliver less than 50 grams of cocaine and/or heroin, MCL 333.7401(2)(a)(*iv*). The court, Martha D. Anderson, J., sentenced defendant as a third-offense habitual offender to concurrent terms of 10 to 40 years in prison. Defendant appealed.

The Court of Appeals *held*:

1. The elements of delivering 50 grams or more, but less than 450 grams of heroin, MCL 333.7401(2)(a)(*iii*), are the delivery of 50 grams or more, but less than 450 grams of heroin or a mixture containing heroin, with the knowledge that he or she was delivering heroin. Under MCL 333.7105(1), the words "deliver" or "delivery" are defined as the actual, constructive, or attempted transfer from 1 person to another of a controlled substance; the singular form of "transfer" indicates that delivery refers to a single transfer, not multiple transfers over a period of time. Under MCL 333.7401(2)(a), the level of charges for the manufacturing, creating, delivering, or possession with intent to manufacture, create, or deliver a schedule 1 or 2 controlled substance are differentiated on the basis of the amount of the controlled substance involved; a more severe punishment is imposed on those who manufacture, create, deliver, or possess greater amounts. Because the prosecutor inappropriately aggregated the amounts of defendant's various small deliveries on separate occasions to support the level of offense charged, there was insufficient evidence to support defendant's conviction of delivering 50 grams or more, but less than 450 grams, of heroin. The Legislature's decision to differentiate between controlled substance offenses on the basis of the quantity of the controlled substance involved would be undercut if the prosecutor were allowed to aggregate multiple small deliveries, and the

word "delivery" denotes a single transfer, not multiple transfers over a period of time. The prosecution inappropriately aggregated the individual transactions under a continuing-course-of-conduct theory; the amount of controlled substance actually delivered is significant in a delivery case, not the amount the defendant and his coconspirators agreed to deliver.

2. An arrest that is statutorily invalid under MCL764.2a(1), which limits the authority a peace officer may exercise outside his jurisdiction, is not necessarily unconstitutional and does not automatically trigger the exclusionary rule as related to the suppression of evidence. The Legislature did not intend for the exclusionary rule to apply in this circumstance because the statute was intended to protect the rights and autonomy of local governments, not to protect criminal defendants. The circuit court did not err by denying defendant's motion to suppress the evidence seized from the search of his car on the basis that the arrest was statutorily invalid.

3. An investigative stop is permissible under the Fourth Amendment, US Const Am IV, if the officer has a reasonable, articulable suspicion that criminal activity is occurring. Reasonableness is determined on a case-by-case basis on a totality of the facts and circumstances and fewer foundational facts are necessary when a moving vehicle is involved. The circuit court did not err by denying defendant's motion to suppress evidence seized from his car because the officers had a reasonable, articulable suspicion that criminal activity was occurring.

4. Trial counsel was not ineffective for failing to investigate the informant's criminal background, or to request a pretrial credibility hearing to impeach him. Defendant failed to provide any factual support for his claim that the informant may have had a prior conviction involving dishonesty and because credibility is a jury's determination it would have been improper for the circuit court to make that determination before trial and block the testimony on that basis.

5. Under MCR 6.120(C), a court is required to sever for separate trials offenses that are not related as defined in subrule (B)(1). MCR 6.120(B)(1)(b) provides that offenses are related if they are based on a series of connected acts. Trial counsel was not ineffective for failing to move to sever the charge of delivery of 50 grams or more, but less than 450 grams, of heroin from the remaining, lesser charges. A motion to sever the charges would have been meritless because the multiple deliveries in this case, while separate crimes, were connected acts for purposes of MCR 6.120(B)(1)(b) and (C).

6. Under US Const, Am VI, an accused has the right to counsel for his defense during all critical stages of a criminal prosecution. A bond revocation hearing is not a critical stage in a criminal prosecution because it has no effect on the determination of the defendant's guilt or innocence. Defendant was not entitled to the presence of counsel during his bond revocation hearing because the bond revocation hearing was not a critical stage in the proceeding and was independent from his jury trial.

7. Defendant's right to be present at all proceedings was not violated when he was not present at the hearing on his motion to quash. Defendant was represented by counsel at that hearing and his counsel waived defendant's presence at the hearing.

Conviction of delivering 50 grams or more, but less than 450 grams, of heroin vacated, remaining convictions affirmed, and case remanded for resentencing on the lesser offenses.

CONTROLLED SUBSTANCES — CHARGES — AMOUNT OF CONTROLLED SUBSTANCES — AGGREGATION OF SMALLER OFFENSES.

Under MCL 333.7105(1), the words "deliver" or "delivery" are defined as the actual, constructive, or attempted transfer from 1 person to another of a controlled substance; the singular form of "transfer" indicates that delivery refers to a single transfer, not multiple transfers over a period of time; under MCL 333.7401(2)(a), the level of charges for the manufacturing, creating, delivering, or possession with intent to manufacture, create, or deliver a schedule 1 or 2 controlled substance are differentiated on the basis of the amount of controlled substance involved; a more severe punishment is imposed on those who manufacture, create, deliver, or possess greater amounts; a prosecutor may not aggregate various smaller deliveries of a controlled substance to support an increase in the level of the charged offense.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Joshua J. Miller*, Assistant Prosecuting Attorney, for the people.

Jonathon B. D. Simon for defendant.

Before: JANSEN, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM. Defendant appeals as of right his jury trial convictions of delivery of 50 grams or more, but less than 450 grams, of heroin, MCL 333.7401(2)(a)(*iii*), possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*), possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), and conspiracy to deliver and/or possess with intent to deliver less than 50 grams of cocaine and/or heroin, MCL 333.7401(2)(a)(*iv*). He was sentenced as a third-offense habitual offender, MCL 769.11, to concurrent terms of 10 to 40 years' imprisonment for each of his convictions. We vacate defendant's conviction of delivering 50 grams or more, but less than 450 grams, of heroin because the trial court improperly allowed the prosecution to aggregate numerous smaller deliveries into one charge. We affirm defendant's other convictions, but remand for resentencing.

This Court reviews the record de novo when addressing a claim of insufficient evidence. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).[1] We also review de novo questions of statutory interpretation. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008).

MCL 333.7401 provides in relevant part:

> (1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance . . . .
>
> (2) A person who violates this section as to:
>
> (a) A controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(*iv*) and:
>
> * * *

[1] Defendant characterizes this issue as one of unpreserved constitutional error. However, the underlying issues that defendant raises involve statutory interpretation and sufficiency of the evidence questions, so we have addressed them as such.

> (*iii*) Which is in an amount of 50 grams or more, but less than 450 grams, of any mixture containing that substance is guilty of a felony . . . .

Heroin is a schedule I controlled substance. MCL 333.7212(1)(b). The elements of delivering 50 grams or more, but less than 450 grams, of heroin are (1) defendant's delivery; (2) of 50 grams or more, but less than 450 grams; (3) of heroin or a mixture containing heroin; (4) with knowledge that he was delivering heroin. See *People v Williams*, 294 Mich App 461, 470; 811 NW2d 88 (2011); see also *People v Mass*, 464 Mich 615, 626-627; 628 NW2d 540 (2001) (stating that the amount and nature of controlled substances are elements of a delivery offense). Although the amount of the controlled substance is an element of a delivery offense, the defendant's knowledge of the amount is not an element. *Mass*, 464 Mich at 626-627. " 'Deliver' or 'delivery' means the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship." MCL 333.7105(1). " '[*T*]*ransfer* is the element which distinguishes delivery from possession.' " *People v Schultz*, 246 Mich App 695, 703; 635 NW2d 491 (2001), quoting *People v Steele*, 429 Mich 13, 25-26; 412 NW2d 206 (1987).

The primary prosecution witness, Jack Blocker, testified that the largest amount that defendant delivered to him on any one occasion was an ounce, or approximately 28 grams. There is no evidence in the record that would support a finding that defendant ever delivered more than 50 grams in a single transaction. Consequently, if the individual deliveries cannot be aggregated, there is no evidence supporting defendant's conviction for delivery of 50 grams or more, but less than 450 grams, of heroin. For the reasons set forth

below, we conclude that defendant's various deliveries of 0.5 to 28 grams of heroin on separate occasions may not be aggregated to support a conviction for delivering 50 grams or more, but less than 450 grams, of heroin under MCL 333.7401(2)(a)(*iii*).

First, MCL 333.7401(2)(a) sets forth different charges for four distinct quantity groups[2] when a defendant is charged with the manufacturing, creating, delivering, or possessing with intent to manufacture, create, or deliver a schedule 1 or 2 controlled substance. The statute sets forth different degrees of punishment, which are dependent on the amount of controlled substance that was delivered. The law imposes a more severe punishment on those who manufacture, create, deliver, or possess greater amounts of a controlled substance. *Mass*, 464 Mich at 624-625. This system created by the Legislature would be undercut by allowing the prosecution to aggregate multiple small deliveries.

Second, delivery is defined as "the actual, constructive, or attempted transfer from 1 person to another of a controlled substance." MCL 333.7105(1). This definition does not use a plural form of "transfer," indicating that delivery is a single transfer, not multiple transfers over a period of time.

Finally, caselaw does not support an interpretation of MCL 333.7401 that would allow the prosecution to aggregate separate deliveries. The question of what constitutes a single criminal transaction with respect to delivering a controlled substance has arisen in double jeopardy cases. In such cases, the defendants argued

[2] Less than 50 grams, MCL 333.7401(2)(a)(*iv*); 50 grams or more, but less than 450 grams, MCL 333.7401(2)(a)(*iii*); 450 grams or more, but less than 1000 grams, MCL 333.7401(2)(a)(*ii*); and 1000 grams or more, MCL 333.7401(2)(a)(*i*).

that their convictions for multiple counts of delivering a controlled substance violated the double jeopardy clause because the deliveries had been part of one criminal transaction. See *People v Bartlett*, 197 Mich App 15, 18; 494 NW2d 776 (1992); *People v Edmonds*, 93 Mich App 129, 133-134; 285 NW2d 802 (1979); *People v Cuellar*, 76 Mich App 20, 21-23; 255 NW2d 755 (1977); *People v Martinez*, 58 Mich App 693, 694-695; 228 NW2d 523 (1975). In that context, we have consistently held that separate deliveries constitute separate criminal transactions, which properly give rise to separate charges. See *Edmonds*, 93 Mich App at 133-134 (holding that two separate sales of heroin on the same day were not part of the same criminal transaction because there was no connection between the two deliveries, such as an agreement to return for a second sale after the first); *Cuellar*, 76 Mich App at 21-23 (concluding that two separate sales of heroin to the same buyer, one month apart, did not constitute the same criminal transaction); *Martinez*, 58 Mich App at 694-695 (holding that two separate deliveries to the same buyer, nine days apart, constituted separate criminal transactions). For example, in *Bartlett*, 197 Mich App at 18, we stated:

> In resolving defendant's double jeopardy challenge, we look to whether the deliveries were separately bargained for and separately paid for and to whether the second delivery was at the same time as the first. See *People v Miller*, 182 Mich App 482, 484; 453 NW2d 269 (1990). In this case, the evidence demonstrated that although the deliveries were close in time, defendant sold two separate amounts of crack cocaine to the two officers separately and that the cocaine rocks were separately bargained for and paid for. We conclude that, under the circumstances of this case, the Legislature intended that defendant be subject to prosecution for each delivery as a separate offense.

We have also considered when a series of acts constitute separate criminal transactions, giving rise to separate charges, in the context of false pretenses and Medicaid fraud cases. See *People v Harajli*, 161 Mich App 399, 403-408; 411 NW2d 765 (1987); *People v Payne*, 177 Mich App 464, 466-468; 442 NW2d 675 (1989). In *Harajli*, 161 Mich App at 401, the defendants were gasoline station owners who tampered with the pumps so that customers were receiving less gasoline than that for which they paid. The prosecution aggregated the amounts that numerous customers were defrauded over several months to charge defendants with the felony of obtaining more than $100 by false pretenses, rather than charging defendants with the misdemeanor of obtaining $100 or less by false pretenses. *Harajli*, 161 Mich App at 401. This Court concluded that "different misrepresentations to different victims, made at different times, constitute different offenses even if they occur at the same place and pursuant to one overall 'scheme.' " *Id.* at 407. In *Payne*, 177 Mich App at 466, the prosecution charged the defendant with " 'using a common plan or scheme to defraud the State of Michigan, Medicaid program,' " by making 505 false claims. We concluded that such a charge was inappropriate because the charging statute, MCL 400.607(1), made it illegal to submit a false claim. Consequently, the submission of each false claim constituted a separate offense, "and must be tried as such." *Payne*, 177 Mich App at 468.

The prosecution relies primarily on conspiracy cases to argue that defendant's individual deliveries can be aggregated under a continuing-course-of-conduct theory. In *People v Rodriguez*, 251 Mich App 10, 23; 650 NW2d 96 (2002), this Court concluded that the jury instructions were proper when the trial court instructed the jury that " '[i]f you believe the evidence so

shows, you *may* add up the separate amounts to show that there was an agreement to deliver over 650 grams or more [sic] of any mixture containing the controlled substance cocaine.' " In *People v Porterfield*, 128 Mich App 35, 38-41; 339 NW2d 683 (1983), this Court held that there was sufficient evidence to convict the defendant of conspiracy to deliver over 50 grams of heroin. The defendant had conspired with other to sell heroin in one-quarter ounce packages on an almost daily basis.

One can conspire with another to deliver more than 50 grams of heroin and then follow through with that plan by delivering 10 grams of heroin on five different occasions. For this reason, conspiring to deliver 50 grams or more, but less than 450 grams, of heroin is fundamentally different from actually delivering that amount of heroin. In a conspiracy case, the amount the defendant and his coconspirators *agree to deliver* is significant, while the amount *actually delivered* is what matters in a non-conspiracy case. See *Rodriguez*, 251 Mich App at 23; *Porterfield*, 128 Mich App at 38-41. Because there was insufficient evidence to convict defendant of delivering 50 grams or more, but less than 450 grams, of heroin, we vacate that conviction.

We reject defendant's multiple challenges to his other convictions, however. Defendant argues that the trial court abused its discretion by denying his motion to suppress evidence that resulted from the police officers' search of his car. This Court reviews de novo a trial court's decision on a motion to suppress evidence. *People v Chowdhury*, 285 Mich App 509, 514; 775 NW2d 845 (2009). The trial court's factual findings are reviewed for clear error. *Id*.

Defendant initially argues that the evidence recovered should be suppressed because the officers were

acting outside their jurisdiction, in violation of MCL 764.2a(1). However, assuming this to be the case, it does not provide a basis for suppression. An arrest that is statutorily invalid under MCL 764.2a(1), which limits the authority a peace officer may exercise outside his jurisdiction, is not necessarily unconstitutional. *People v Hamilton*, 465 Mich 526, 532-533; 638 NW2d 92 (2002), abrogated on other grounds *Bright v Ailshie*, 465 Mich 770, 775 n 5 (2002). A statutorily invalid arrest therefore does not automatically trigger the exclusionary rule. Our Supreme Court has determined that the Legislature did not intend for the exclusionary rule to apply to an arrest that is invalid under MCL 764.2a(1) because the statute was intended to " 'protect the rights and autonomy of local governments,' " not to protect criminal defendants. *Hamilton*, 465 Mich at 534-535 (citation omitted).

Defendant also asserts that the police lacked reasonable suspicion of criminal activity to justify their investigative stop. We disagree. An investigative stop, or *Terry*[3] stop, is permissible under the Fourth Amendment "if the officer has a reasonable, articulable suspicion that criminal activity is afoot." *People v Steele*, 292 Mich App 308, 314; 806 NW2d 753 (2011). Reasonableness is determined on a case-by-case basis, based on a totality of the facts and circumstances. *Id.* at 314-315. "Fewer foundational facts are necessary to support a finding of reasonableness when moving vehicles are involved than when a house or home is involved." *Id.* at 315, citing *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001). The officers in this case had a reasonable, articulable suspicion that criminal activity was afoot. See *Steele*, 292 Mich App at 314. The officers had just apprehended Teresa Mienk at the Bahama

[3] *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

Motel and had just found packaged heroin and cocaine in her car in amounts that matched the amounts Blocker had ordered from defendant. The officers saw Mienk at defendant's house immediately before she drove to the Bahama Motel with the drugs. After she left defendant's house, Mienk received multiple calls from the same telephone number that Blocker had used to contact defendant. Blocker had proved to be a credible source—his descriptions of defendant and Mienk were accurate, including the cars they drove and where defendant lived. Finally, the officers had reason to believe that defendant was in the red Durango. They were on the street where defendant lived, they had seen a red Durango in defendant's driveway earlier that evening, and they had also seen defendant in that driveway. Accordingly, the police had a reasonable, articulable suspicion that criminal activity was occurring.

In his Standard 4 supplemental brief,[4] defendant argues that his trial counsel was ineffective for failing to properly investigate and impeach Blocker and for failing to move to sever his charge of delivering 50 grams or more, but less than 450 grams, of heroin from the other charges against him.[5]

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[4] Administrative Order, No. 2004-6, Standard 4, allows a defendant to file a brief *in propria persona*, raising issues that his or her attorney believes are without merit.

[5] When this Court reviews an unpreserved claim of ineffective of assistance of counsel, it is limited to the facts on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). The circuit court's factual findings are reviewed under a clearly erroneous standard. MCR 2.613(C).

Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. In order to establish ineffective assistance of counsel, a defendant must demonstrate that " 'counsel's representation fell below an objective standard of reasonableness,' " and

Defendant claims that his trial counsel was ineffective for failing to investigate Blocker's criminal background or request a pretrial credibility hearing to impeach Blocker. Defendant speculates that a background check *may* have revealed a prior conviction involving dishonesty. However, defendant does not provide any factual support for this assertion. Moreover, contrary to defendant's unsupported assertion, the existence of a prior conviction with which a witness may be impeached does not provide a basis to bar the witness from testifying, as it goes to the weight rather than admissibility of that testimony. Given the jury's purview over questions of witness credibility, it would have been improper for the trial court to make a determination on Blocker's credibility before trial and then prohibit Blocker from testifying. See *Jackson*, 292 Mich App at 590. Thus, trial counsel's failure to request the court to do so was not ineffective assistance.

Defendant also claims that his trial counsel was ineffective because he did not move to sever count I, delivery of 50 grams or more, but less than 450 grams, of heroin, from the other three counts against defendant. First, defendant fails to explain why the failure to sever this charge may have resulted in jury confusion. Second, MCR 6.120(C) requires the court to "sever for separate trials offenses that are not related as defined in subrule (B)(1)." MCR 6.120(B)(1)(b) provides that offenses are related if they are based on "a series of connected acts." In this case, the multiple deliveries

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that "there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Smith v Spisak*, 558 US 139; 130 S Ct 676, 685; 175 L Ed 2d 595 (2010), citing *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Counsel is not ineffective for failing to make a meritless argument or raise a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

from defendant to Blocker, while separate crimes, were connected acts. Counsel was not ineffective for failing to make a meritless argument or raise a futile objection. *Ericksen*, 288 Mich App at 201.

Defendant also argues a Sixth Amendment violation[6] because the trial court held a bond revocation hearing when he was unrepresented by counsel. Under the Sixth Amendment, an accused has the right to counsel for his defense during all critical stages of a criminal prosecution. US Const, Am VI; see also *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). When this right is violated it constitutes a structural, constitutional error requiring automatic reversal. *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005). However, the bond revocation hearing was not a "critical stage" in the proceeding because it did not have any effect on the determination of defendant's guilt or innocence. *People v Killebrew*, 16 Mich App 624, 627; 168 NW2d 423 (1969). There was no jury present at the hearing, and the jury was never informed that defendant's bond had been revoked. Because the bond revocation hearing was not a critical stage in the proceeding, and was completely independent from defendant's jury trial, the presence of counsel was not constitutionally required. *People v Blue*, 178 Mich App 537, 539; 444 NW2d 226 (1989).

Lastly, defendant claims that his right to be present at all proceedings was violated because he was not

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[6] This Court reviews de novo constitutional questions. *People v Brown*, 294 Mich App 377, 389; 811 NW2d 531 (2011). When an alleged error involves a constitutional right, that error is either structural or nonstructural. *People v Willing*, 267 Mich App 208, 223; 704 NW2d 472 (2005). However, the deprivation of the right to counsel at a noncritical stage of a criminal proceeding is a nonstructural constitutional error. *Id.* at 224. Unpreserved, nonstructural constitutional errors are reviewed for plain error affecting the defendant's substantial rights. *Brown*, 294 Mich App at 389.

present when the court heard his motion to quash. However, defendant was represented by counsel at that hearing and his counsel waived defendant's presence at the hearing. Indeed, his counsel succeeded at the motion hearing to the extent that the prosecution agreed to dismiss one count and to amend another.

In sum, we affirm defendant's convictions for possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*), possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), and conspiracy to deliver and/or possess with intent to deliver less than 50 grams of cocaine and/or heroin, MCL 333.7401(2)(a)(*iv*). However, we conclude that defendant's conviction of delivering 50 grams or more, but less than 450 grams, of heroin, MCL 333.7401(2)(a)(*iii*), is invalid. Accordingly, we remand the case to the trial court for it to vacate that conviction. Finally, because we are vacating the conviction on the most serious charge and his other sentences were based in part on this inaccurate information, we also remand for resentencing on the remaining convictions. *People v Jackson*, 487 Mich 783, 792-793; 790 NW2d 340 (2010). We do not retain jurisdiction.

JANSEN, P.J., and FORT HOOD and SHAPIRO, JJ., concurred.

PEOPLE v CARP

Docket No. 307758. Submitted October 16, 2012, at Lansing. Decided November 15, 2012, at 9:05 a.m. Leave to appeal sought.

Raymond C. Carp was convicted in 2006 by a jury in the St. Clair Circuit Court of first-degree murder, armed robbery, larceny in a building, and larceny of property worth $1,000 or more but less than $20,000. The court, James P. Adair, J., sentenced defendant to concurrent terms of mandatory life imprisonment without parole for the first-degree murder conviction, 15 to 30 years in prison for the armed robbery conviction and 1 to 4 years in prison for the larceny convictions. The Court of Appeals, SCHUETTE, P.J., and ZAHRA and OWENS, JJ., affirmed defendant's convictions and sentences on direct appeal in an unpublished opinion per curiam, issued December 30, 2008 (Docket No. 275084), and the Supreme Court denied his application for leave to appeal, 483 Mich 1111 (2009). The circuit court denied defendant's subsequent motion for relief from the judgment, and the Court of Appeals denied his application for delayed leave to appeal in an unpublished order, entered June 8, 2012 (Docket No. 307758). The Court of Appeals subsequently granted defendant's motion for reconsideration in an unpublished order, entered August 9, 2012 (Docket No. 307758), to address whether defendant was entitled to resentencing following the United States Supreme Court's decision in *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012).

The Court of Appeals *held*:

1. The Eighth Amendment requires that juveniles be treated differently than adults when being sentenced. The *Miller* Court enunciated a new rule when it held that the Eighth Amendment's prohibition against cruel and unusual punishment prohibits a sentencing scheme that mandates life in prison without parole for juvenile offenders. Mandatorily sentencing a juvenile offender to life in prison without parole would not be proportionate because it would not allow the sentencing court to consider the special characteristics of youth or the circumstances of the offense when imposing sentence.

2. *Miller* does not apply retroactively to cases on collateral review. An appeal of a judgment of conviction is final upon the conclusion of direct review or the expiration of the time for seeking that review in federal or state court. A newly announced rule of law applies to all criminal cases still pending on direct review. Unless an exception applies, new constitutional rules of criminal procedure may not be applied retroactively on collateral review, which occurs when cases have become final before the new rule was announced. A new rule should be applied retroactively on collateral review if it requires the observance of those procedures that are substantive or if it is a watershed rule of criminal procedure that implicates the fundamental fairness and accuracy of the criminal proceeding, such as the right to counsel. A watershed rule is one that is necessary to prevent an impermissibly large risk of an inaccurate conviction and alters the bedrock procedural elements essential to the fairness of a proceeding. The *Miller* Court's prohibition of mandatory life in prison without parole for juvenile homicide offenders applies to cases currently pending on direct appeal, but may not be applied retroactively to those cases on collateral reviews. The rule was procedural, not substantive in nature because it did not categorically bar a penalty but instead required that sentencing courts follow a certain process. It did not alter the elements necessary for a homicide conviction or the range of conduct or the class of person that the law punishes. Nor was it a watershed rule. *Miller* dealt exclusively with the accuracy of sentencing and did not pertain to criminal trial procedures leading to a conviction.

3. A state may accord broader effect to a new rule of criminal procedure than federal retroactivity jurisprudence accords. In Michigan determining retroactivity requires consideration of the purpose of the new rule, the general reliance on the old rule, and the effect of retroactive application on the administration of justice. A new rule of criminal procedure may be retroactively applied on collateral review when it concerns the ascertainment of guilt or innocence, but a new rule of procedure that does not affect the integrity of the fact-finding process should be given prospective effect. With respect to reliance, the defendant must have suffered actual harm from relying on the old rule. Finally, it must be determined whether retroactive application of the new rule would undermine the state's strong interest in finality of the criminal justice process. Under Michigan law, the *Miller* Court's prohibition of mandatory life in prison without parole for juvenile homicide offenders is not subject to retroactive application for cases on collateral review. The *Miller* decision

did not concern the ascertainment of guilt or innocence and did not affect the integrity of the fact-finding process. Because *Miller* did not categorically ban life without parole sentences for juveniles convicted of a homicide offense, defendant cannot prove actual harm if the new rule was not applied retroactively. Judicial resources would be better directed to those defendants currently charged or those cases pending on direct review.

4. *Miller* is applicable to those cases currently pending or on direct review. It requires that sentencing courts impose an individualized and proportionate sentence by considering the characteristics of youth associated with a juvenile defendant, as well as the details of the offense, when determining whether to sentence a juvenile convicted on a homicide offense to life in prison with or without the possibility of parole. At sentencing, a court should consider (1) the character and record of the defendant and the circumstances of the offense, (2) the chronological age of the minor defendant, (3) the background and mental and emotional development of a youthful defendant, (4) the family and home environment, (5) the circumstances of the homicide offense, including the extent of the juvenile defendant's participation in the offense and the way family and peer pressures might have affected him or her, (6) whether the juvenile defendant might have been charged and convicted of a lesser offense if not for the incompetencies associated with youth, and (7) the potential for rehabilitation. The Parole Board may not ignore the sentencing court's determination when parole eligibility arises.

5. MCL 791.234(6)(a), which excludes any prisoner serving a life sentence for first-degree murder from eligibility for parole, is unconstitutional as written and as applied to juvenile offenders convicted of homicide because it fails to acknowledge a sentencing court's discretion to determine, as required by *Miller*, that a convicted juvenile homicide offender may be eligible for parole. The *Miller* decision applies to all juveniles under the age of 18 at the time the homicide offense occurred. Even though relevant Michigan court rules and statutes concerning sentencing—MCR 6.903(E), MCL 600.606(1), and MCL 764.27—define a "juvenile" as a person 14 years of age or older but less than 17 years of age, Michigan courts are required to follow the *Miller* Court's determination that for sentencing purposes a juvenile is any person under the age of 18 years at the time of the crime.

Affirmed.

1. CONSTITUTIONAL LAW — SENTENCING AND PUNISHMENT — JUVENILE OFFENDERS — CRUEL AND UNUSUAL PUNISHMENT.

The Eighth Amendment requires that juveniles under the age of 18 be treated differently than adults when being sentenced; a sentencing scheme that mandates life in prison without parole for juvenile offenders constitutes cruel and unusual punishment under the Eighth Amendment; mandatorily sentencing a juvenile offender to life in prison without parole is not proportionate because it would not allow the sentencing court to consider the special characteristics of youth or the circumstances of the offense when imposing sentence; at sentencing, a court should consider (1) the character and record of the defendant and the circumstances of the offense, (2) the chronological age of the minor defendant, (3) the background and mental and emotional development of a youthful defendant, (4) the family and home environment, (5) the circumstances of the homicide offense, including the extent of the juvenile defendant's participation in the offense and the way family and peer pressures might have affected him or her, (6) whether the juvenile defendant might have been charged and convicted of a lesser offense if not for the incompetencies associated with youth, and (7) the potential for rehabilitation.

2. CONSTITUTIONAL LAW — SENTENCING AND PUNISHMENT — JUVENILE OFFENDERS — RETROACTIVE APPLICATION — COLLATERAL REVIEW.

Unless an exception applies, new constitutional rules of criminal procedure may not be applied retroactively on collateral review; a new rule should be applied retroactively on collateral review if it requires the observance of those procedures that are substantive or if it is a watershed rule of criminal procedure that implicates the fundamental fairness and accuracy of the criminal proceeding; a watershed rule is one that is necessary to prevent an impermissibly large risk of an inaccurate conviction and alters the bedrock procedural elements essential to the fairness of a proceeding; under federal and Michigan law, the prohibition against mandatory life in prison without parole for juvenile homicide offenders applies to cases currently pending on direct appeal, but may not be applied retroactively to criminal cases on collateral review.

3. STATUTES — SENTENCING AND PUNISHMENT — JUVENILE OFFENDERS — CONSTITUTIONAL LAW.

MCL 791.234(6)(a), which excludes any prisoner serving a life sentence for first-degree murder from eligibility for parole, is unconstitutional as written and as applied to juvenile offenders

under the age of 18 convicted of homicide because it fails to acknowledge a sentencing court's discretion to determine that a convicted juvenile homicide offender may be eligible for parole.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Michael D. Wendling*, Prosecuting Attorney, and *Timothy K. Morris*, Assistant Prosecuting Attorney, for the people.

Selby Law Firm, PLLC (by *Patricia L. Selby*), for defendant.

Amici Curiae:

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *B. Eric Restuccia*, Deputy Solicitor General, and *Richard A Bandstra*, Chief Legal Counsel, for the Attorney General.

Dawn Van Hoek, *Brett M. DeGroff*, *Marla R. McCowan*, *Michael L. Mittlestat*, *Johnathon Sacks*, and *Christopher M. Smith* for the State Appellate Defender Office.

David S. Leyton, *Kym L. Worthy*, and *Timothy A. Baughman*, for the Prosecuting Attorneys Association of Michigan.

Stuart G. Friedman for the Criminal Defense Attorneys of Michigan.

Daniel S. Korobkin, *Michael J. Steinberg*, *Kary L. Moss*, *Kimberly A. Thomas*, and *Deborah L. LaBelle* for the American Civil Liberties Union, the American Civil Liberties Union of Michigan, and the University of Michigan Law School Juvenile Justice Clinic.

Before: TALBOT, P.J., and FITZGERALD and WHITBECK, JJ.

TALBOT, P.J. A jury convicted defendant, Raymond Curtis Carp, of first-degree murder,[1] armed robbery,[2] larceny in a building,[3] and larceny of property worth $1,000 or more but less than $20,000.[4] The trial court sentenced Carp to mandatory life imprisonment without parole for the first-degree murder conviction, 15 to 30 years' imprisonment for the armed robbery conviction and 1 to 4 years' imprisonment for both larceny convictions, to be served concurrently. Following an appeal as of right, this Court affirmed his convictions and sentences.[5] The Michigan Supreme Court denied Carp's subsequent application for leave to appeal.[6] Following the trial court's denial of his motion for relief from the judgment, Carp again applied to this Court for delayed leave to appeal, which this Court denied.[7] Subsequently, this Court granted Carp's motion for reconsideration of that order[8] to address his contention of entitlement to resentencing following the recent decision by the United States Supreme Court in *Miller v Alabama*.[9] We affirm.

I. STANDARD OF REVIEW

"[W]hether a United States Supreme Court decision

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[1] MCL 750.316.

[2] MCL 750.529.

[3] MCL 750.360.

[4] MCL 750.356(3)(a).

[5] *People v Carp*, unpublished opinion per curiam of the Court of Appeals, issued December 30, 2008 (Docket No. 275084).

[6] *People v Carp*, 483 Mich 1111 (2009).

[7] *People v Carp*, unpublished order of the Court of Appeals, entered June 8, 2012 (Docket No. 307758).

[8] *People v Carp*, unpublished order of the Court of Appeals, entered August 9, 2012 (Docket No. 307758).

[9] *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012).

applies retroactively presents a question of law that we review de novo."[10]

II. *PEOPLE v CARP*

The events leading to Carp's conviction involved the murder of Mary Ann McNeely in her home on May 31, 2006. At that time, Carp was 15 years of age. Carp's 22-year-old half-brother,[11] Brandon Gorecki, began to reside with the victim after his mother told him to leave the family residence because of his continued drug use. Their mother permitted Carp to visit his half-brother and spend the night at the victim's home. That night, Gorecki became involved in a verbal argument and physical confrontation with his girlfriend at the victim's residence. According to Gorecki's girlfriend, the victim intervened, affording the girlfriend an opportunity to leave the premises.

Following this confrontation, Carp and Gorecki left the victim's residence but returned a short time later. Gorecki and the victim began to argue, and the argument evolved into a physical confrontation. Although Gorecki denied an ability to recall the events that transpired due to his use of drugs and alcohol, he admitted stabbing the victim more than once in the neck area and also striking her in the head with a mug. According to Gorecki, during this confrontation, Carp "threw a mug at the victim and closed the drapes." Gorecki acknowledged trying to clean up the victim's blood and removing electronic equipment from the victim's home. Gorecki also took the victim's truck while Carp accompanied him.

The medical examiner indicated that the victim had "23 stab wounds to the face and neck and nine stab

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[10] *People v Gomez*, 295 Mich App 411, 414; 820 NW2d 217 (2012).

[11] Carp and Gorecki have the same mother, Margie Carp.

wounds to the torso" along with "incised wounds to the victim's extremities" and "numerous blunt force injuries including lacerations and bruises to the skin and fractures of the skull and injuries to the brain." Neither Carp nor Gorecki returned to the victim's home to determine her status or secure any assistance for her. It was not until June 1, 2006, following the receipt of a telephone call from Gorecki that his mother and a friend went to the victim's home to investigate and contacted police when they encountered "bloody footprints."

At trial the prosecutor presented evidence regarding statements by Carp to friends after the murder, indicating that he had thrown a mug at the victim and that Gorecki subsequently stabbed her. Although Carp admitted to another individual that he threw a mug at the victim, he denied knowing whether it made contact because his eyes were closed. To another friend, Carp stated that he struck the victim in the back of the head with a mug he had removed from the freezer and that, at the direction of Gorecki, he closed the blinds and windows. Carp also said that he "held the victim down while [Gorecki] kneed her face" and that Gorecki asked him for a knife, which Carp handed to him. Purportedly, Carp indicated that the victim was a "horrible person and deserved to die."

Carp's statements to police varied. While acknowledging the argument between the victim and Gorecki, Carp asserted that both were intoxicated and that Gorecki began to strike the victim and grabbed a knife from a kitchen drawer. Carp denied seeing Gorecki stab the victim or assisting in trying to clean up the blood. In a later interview, Carp denied striking the victim and indicated that he was unable to assist Gorecki in the clean up because he became ill. During his third inter-

view with police, Carp admitted he struck the victim with a heavy glass because Gorecki "was wrestling on the kitchen floor with the victim and stated to him, '[h]elp me, man. Help me, help me . . . . What do you want me to do. Bust, bust her in the head.' " Carp further admitted to closing the drapes and shutting the windows and that he assisted in taking the electronic equipment, placing the items in the victim's truck. At trial, Carp asserted duress as his primary defense.

As already stated, the jury convicted Carp of first-degree murder, armed robbery, larceny in a building, and larceny of property worth $1,000 or more but less than $20,000. The trial court sentenced Carp on November 20, 2006. A presentence investigation report was prepared and made available to the trial court. When queried by the trial court, the prosecutor stated the following as factors to be considered in sentencing, relevant to the circumstances of this case:

> [T]his is a situation where the Court has heard the testimony in this case and you, I believe, have the best understanding, objective and rational understanding of exactly what happened here and this Defendant's role in it. I think as it's been demonstrated in the PSI [presentence investigation report], in the Defendant's comments and his statements to the investigating officer in this case, he has never in any way, shape or form accepted responsibility for his role in what happened to this victim. He has never in any way, shape or form acknowledged that had it not been for his assistance to his brother, [the victim] may be alive today. And I find that to be extremely unfortunate, and it's unfortunate because the Defendant does not accept his role and does not indicate to the Court that he understands his part in what happened.
>
> This Court knows exactly how violent and how brutal this murder was and obviously the statutes in place dictate what the sentence must be in this case, but irrespective of

> that I believe that the recommendation is appropriate on all accounts and I would ask the Court to follow it.

Citing caselaw and statutes pertaining to disposition hearings for juveniles,[12] defense counsel at sentencing began to discuss factors for a "designated waiver case," suggesting that the court was authorized to impose "either juvenile disposition . . . an adult sentence . . . or blended sentence." Defense counsel asserted that sentencing Carp to life imprisonment without parole was inherently unjust in light of his level of participation and lesser culpability in commission of the crime. At this point, the prosecutor and the trial court clarified that the factors were not applicable because this was an "automatic waiver case."

Seemingly in anticipation of the *Miller* Court's decision, defense counsel continued. While recognizing that Carp had some culpability in the crime, which demanded public punishment counsel asserted:

> [B]ut when the public punishment is one of mandatory life without the possibility of parole for a 15-year-old that presents himself to this Court with absolutely no prior record whatsoever and without at least in my opinion, a direct and intentional culpability or responsibility in the commission of this crime, I think [it] is inherently unjust, I think it's inherently unfair, and at the very least completely inappropriate with respect to individual, individualizing a sentencing that's appropriate to this Defendant.

In sentencing Carp to life without parole, the trial court commented:

> This is probably the most horrific case that I've been involved with in my entire career, the brutality of this act that was committed on the victim, my recollection is that even to the extent that the testimony of the doctor indicated there was actually no blood left in her body.

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[12] *People v Petty*, 469 Mich 108, 113-118; 665 NW2d 443 (2003); MCL 712A.18.

> The Court can't help but note that there were several opportunities that this Defendant had to, to escape, leave, get away, assist her in some way, and I — there's just — I can't find an explanation that I — for the fact that he didn't do that, from the testimony, the evidence that I heard during the course of this trial. There's nothing that I can muster or conjure up to explain to me why he didn't do that. I know there's strong discussion that he was under the influence of his stepbrother who was a bad actor to say the least, but this 15-year-old and then now 16-year-old, certainly had the sufficient faculties that he — there's no reason why he couldn't understand what was going on and what he, what he could have or should have done, and the unfortunate conclusion is that the victim is dead, and I believe that under the circumstances the, the conviction is proper, it's within the law, and is then for the Court obligated to follow the law.

III. THE PAST AS PROLOGUE

A. INTRODUCTION

The importance of the past in shaping the present is recognized in William Shakespeare's *The Tempest*, when Antonio states, "Whereof what's past is prologue, what to come/ In yours and my discharge."[13] Although the *Miller* decision is the premise for our reconsideration of Carp's sentencing, it useful for this Court and trial courts that may implement this opinion to obtain an understanding of the historical context of United States Supreme Court rulings regarding Eighth Amendment jurisprudence that culminated in *Miller*.

As discussed by the Supreme Court in *Graham v Florida*, the Eighth Amendment provides:

> "Excessive bail shall not be required, nor excessive fines imposed, *nor* cruel and *unusual punishments inflicted*." To

[13] Shakespeare, *The Tempest*, act II, sc 1.

> determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to " 'the evolving standards of decency that mark the progress of a maturing society.' " "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.' "
>
> The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances. "[P]unishments of torture," for example, "are forbidden." These cases underscore the essential principle that, under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes.
>
> For the most part, however, the Court's precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime. The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense."[14]

B. *RUMMEL v ESTELLE*: MANDATORY LIFE SENTENCES FOR ADULTS

In *Rummel v Estelle*,[15] the United States Supreme Court rejected an adult defendant's contention that his mandatory life sentence constituted cruel and unusual punishment under the Eighth Amendment. Five justices upheld the defendant's mandatory life sentence in accordance with Texas law, which required a life sentence under a recidivist sentencing statute for second and third felony convictions. The Texas trial court sentenced the defendant premised

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[14] *Graham v Florida*, 560 US ___; 130 S Ct 2011, 2021; 176 L Ed 2d 825 (2010) (citations omitted; emphasis added).

[15] *Rummel v Estelle*, 445 US 263; 100 S Ct 1133; 63 L Ed 2d 382 (1980).

on his third conviction for felonies involving the fraudulent use of a credit card, forgery, and felony theft. The majority of justices of the United States Supreme Court specifically recognized the authority of the Texas legislature to impose sentences of increasing length on repeat offenders and the state's interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law."[16]

But the Court did not find a constitutional violation despite the fact that all three of the defendant's convictions arose from nonviolent property offenses. The Court also emphasized evidence that defendants sentenced to life under the recidivist statutory scheme typically were eligible for parole in as early as 12 years. While alluding to and discussing earlier cases that reviewed punishments as "grossly disproportionate" to the charged offenses as demonstrating an Eighth Amendment violation, the Court did not adopt such a test or definition.[17] Recognizing a "proportionality principle,"[18] the Court concluded that the primary inquiry should comprise objective criteria in order to avoid judgments premised on "subjective views" or varying standards of individual judges.[19] The Court deemed unpersuasive the comparisons by the defendant to other states' recidivist statutes.[20]

In his dissent, Justice Powell opined that Rummel's sentence was grossly disproportionate and that the possibility of parole was too speculative, rendering the

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[16] *Id.* at 276.

[17] *Id.* at 271-272.

[18] *Id.* at 274 n 11.

[19] *Id.* at 275-276.

[20] *Id.* at 279-280.

defendant's sentence a violation of the Eighth Amendment prohibition against cruel and unusual punishment. Citing the historical recognition and use of proportionality in the review of punishments, Justice Powell identified three factors for consideration: (a) the nature of the particular offense, including factual circumstances specific to the offender and his or her criminal history, (b) the comparable sentencing schemes effectuated in other jurisdictions, and (c) the punishments imposed by the state for other offenses.[21]

C. *SOLEM v HELM*: PROPORTIONALITY IN SENTENCING

Notably, Justice Powell three years later wrote the majority opinion in *Solem v Helm*,[22] which again dealt with a sentence imposed under a recidivist statute. The defendant, Helm, engaged in six nonviolent felonies over a period of 15 years, which subjected him to life in prison without parole. In determining that the Eighth Amendment required proportionality between the offense and the punishment imposed, the majority held that although a reviewing court must give "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments," the Eighth Amendment necessitates that "a criminal sentence . . . be proportionate to the crime for which the defendant has been convicted" and that "no penalty is *per se* constitutional."[23] In determining the constitutionality of a sentence, the Court identified the following factors to be considered: (a) "the gravity of the offense and the harshness of the penalty," (b) the sentences typically imposed in other jurisdic-

[21] *Id.* at 295-306.

[22] *Solem v Helm*, 463 US 277; 103 S Ct 3001; 77 L Ed 2d 637 (1983).

[23] *Id.* at 290.

tions for the same crime, and (c) the sentences imposed within the same jurisdiction for different offenses.[24]

The Court further indicated that the personal characteristics and history of the defendant and his offenses should also be considered.[25] Consequently, the Court found that the defendant's conviction violated the Eighth Amendment. Chief Justice Burger's dissent took issue with the failure to follow *Rummel*'s rejection of a proportionality review except in extreme and rare instances in nonfelony cases.[26]

D. *HARMELIN v MICHIGAN*: EXCLUSION OF MITIGATING FACTORS FOR SERIOUS CRIMES

Eight years later, and closer to home, the Court found a Michigan statute imposing a life sentence without the possibility of parole for the possession of more than 650 grams of cocaine did not offend the Eighth Amendment.[27] Notably, the defendant had no previous felony convictions. The only area of specific concurrence among the justices was that when dealing with a serious crime, the state could impose a severe punishment that excluded consideration of "mitigating factors" pertaining to a particular defendant without violating the Eighth Amendment. The Court noted, "We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further."[28] In contrast, the dissent emphasized a principle of proportionality in conjunction with the Eighth Amendment and endorsed the factors the *Solem* Court previously

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[24] *Id.* at 292.

[25] *Id.* at 296-297 n 22, 303 n 32.

[26] *Id.* at 305-318 (Burger, C.J., dissenting).

[27] *Harmelin v Michigan*, 501 US 957, 994-996; 111 S Ct 2680; 115 L Ed 2d 836 (1991).

[28] *Id.* at 996.

elucidated. Subsequent cases dealing with recidivist statutes again rejected a proportionality review.[29]

E. *ROPER v SIMMONS*: PROHIBITION OF THE DEATH PENALTY FOR JUVENILES

Beginning in 2005, the United States Supreme Court issued a series of decisions pertaining specifically to the Eighth Amendment and juveniles. In *Roper v Simmons*,[30] the Court determined that the Eighth Amendment precluded the imposition of the death penalty on juvenile offenders.[31] Noting a general public consensus against the imposition of such extreme punishment for juveniles, the Court went on to state:

> Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution. This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. In any capital case a defendant has wide latitude to raise as a mitigating factor any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. There are a number of crimes that beyond question are severe in absolute terms, yet the death penalty may not be imposed for their commission. The death penalty may not be imposed on certain classes of offenders, such as juveniles

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[29] See *Ewing v California*, 538 US 11, 22-24, 30-31; 123 S Ct 1179; 155 L Ed 2d 108 (2003), and *Lockyer v Andrade*, 538 US 63, 72-73; 123 S Ct 1166; 155 L Ed 2d 144 (2003).

[30] *Roper v Simmons*, 543 US 551, 568-575; 125 S Ct 1183; 161 L Ed 2d 1 (2005).

[31] The case specifically abrogated *Stanford v Kentucky*, 492 US 361; 109 S Ct 2969; 106 L Ed 2d 306 (1989).

> under 16, the insane, and the mentally retarded, no matter how heinous the crime. These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders.[32]

The Court proceeded to recognize the differences between juvenile and adult offenders, referencing: (a) the " 'lack of maturity and an underdeveloped sense of responsibility,' " (b) the vulnerability and susceptibility of juveniles to "negative influences and outside pressures, including peer pressure," and (c) that "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[33]

The Court went on to rule that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."[34] Of note is the Court's recognition that the existence of the alternative penalty of life without parole assisted in justifying the decision to preclude use of the death penalty for specified juveniles, stating, "To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person."[35]

In her dissent, Justice O'Connor, while recognizing the legitimacy of proportionality concerns in the imposition of the death penalty, implied the existence of a procedural fail-safe precluding the necessity of categorical rules, stating:

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[32] *Roper*, 543 US at 568-569 (quotation marks and citations omitted).

[33] *Id.* at 569-570 (citation omitted).

[34] *Id.* at 578.

[35] *Id.* at 572.

> The proportionality issues raised by the Court clearly implicate Eighth Amendment concerns. But these concerns may properly be addressed not by means of an arbitrary, categorical age-based rule, but rather through individualized sentencing in which juries are required to give appropriate mitigating weight to the defendant's immaturity, his susceptibility to outside pressures, his cognizance of the consequences of his actions, and so forth. In that way the constitutional response can be tailored to the specific problem it is meant to remedy. The Eighth Amendment guards against the execution of those who are "insufficient[ly] culpab[le]," in significant part, by requiring sentencing that "reflect[s] a reasoned *moral* response to the defendant's background, character, and crime." Accordingly, the sentencer in a capital case must be permitted to give full effect to all constitutionally relevant mitigating evidence. A defendant's youth or immaturity is, of course, a paradigmatic example of such evidence.[36]

Justice Scalia's dissent sought to distinguish between juveniles engaged in "risky or antisocial behavior" from those executing heinous, premeditated acts. Specifically:

> Moreover, the cited studies describe only adolescents who engage in risky or antisocial behavior, as many young people do. Murder, however, is more than just risky or antisocial behavior. It is entirely consistent to believe that young people often act impetuously and lack judgment, but, at the same time, to believe that those who commit premeditated murder are—at least sometimes—just as culpable as adults. Christopher Simmons, who was only seven months shy of his 18th birthday when he murdered Shirley Crook, described to his friends *beforehand*—"[i]n chilling, callous terms," as the Court puts it—the murder he planned to commit. He then broke into the home of an innocent woman, bound her with duct tape and electrical wire, and threw her off a bridge alive and conscious. In their *amici* brief, the States of Alabama, Delaware, Okla-

[36] *Id.* at 602-603 (O'Connor, J., dissenting) (citations omitted).

> homa, Texas, Utah, and Virginia offer additional examples of murders committed by individuals under 18 that involve truly monstrous acts. In Alabama, two 17-year-olds, one 16-year-old, and one 19-year-old picked up a female hitchhiker, threw bottles at her, and kicked and stomped her for approximately 30 minutes until she died. They then sexually assaulted her lifeless body and, when they were finished, threw her body off a cliff. They later returned to the crime scene to mutilate her corpse. Other examples in the brief are equally shocking. Though these cases are assuredly the exception rather than the rule, the studies the Court cites in no way justify a constitutional imperative that prevents legislatures and juries from treating exceptional cases in an exceptional way—by determining that some murders are not just the acts of happy-go-lucky teenagers, but heinous crimes deserving of death.[37]

F. *GRAHAM v FLORIDA*: PROHIBITION OF LIFE SENTENCES WITHOUT PAROLE FOR JUVENILES COMMITTING CRIMES OTHER THAN HOMICIDE

In *Graham v Florida*,[38] the precursor to *Miller*, the United States Supreme Court addressed the Eighth Amendment and the imposition of punishment entailing life in prison without parole for juveniles for crimes other than homicide. The majority determined that the Eighth Amendment precluded sentencing juveniles to life in prison without parole for crimes less than homicide. Noting concerns with proportionality and the reasons for incarceration encompassing both retribution and rehabilitation, the Court primarily focused on evidence in the behavioral and social sciences indicating the differences in juvenile brain functioning and lack of maturation. The Court found:

> Community consensus, while entitled to great weight, is not itself determinative of whether a punishment is cruel

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[37] *Id.* at 618-619 (citations omitted).

[38] *Graham*, 560 US ___; 130 S Ct 2011.

> and unusual. In accordance with the constitutional design, the task of interpreting the Eighth Amendment remains our responsibility. The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals.[39]

Citing the *Roper* Court's recognition of the "lessened culpability" of juveniles and lack of maturity, the Court noted, "A juvenile is not absolved of responsibility for his actions, but his transgression is not as morally reprehensible as that of an adult."[40] Further,

> from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. These matters relate to the status of the offenders in question; and it is relevant to consider next the nature of the offenses to which this harsh penalty might apply.[41]

The Court further distinguished and recognized the existence of "a line between homicide and other serious violent offenses against the individual."[42] As a consequence of this distinction, "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis."[43]

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[39] *Id.* at ___; 130 S Ct at 2026 (citations and quotation marks omitted).

[40] *Id.* at ___; 130 S Ct at 2026.

[41] *Id.* at ___; 130 S Ct at 2026-2027 (citations and quotation marks omitted).

[42] *Id.* at ___; 130 S Ct at 2027 (citation and quotation marks omitted).

[43] *Id.* at ___; 130 S Ct at 2027.

In his dissent, Justice Thomas, joined in part by Justices Scalia and Alito, chastised the majority for its misuse of the historical evaluation of Eighth Amendment cases dealing with cruel and unusual punishment as being restricted to especially torturous methods of punishment rather than to the imposition of sentence and rejecting the concept of proportionality in regard to Eighth Amendment jurisprudence.[44] Foreshadowing concerns that this Court must address regarding the establishment of rules and procedures in addition to determining precisely where a line is to be drawn, the dissent took issue with the Court's raising more questions than it answered, asserting:

> Both the Court and the concurrence claim their decisions to be narrow ones, but both invite a host of line-drawing problems to which courts must seek answers beyond the strictures of the Constitution. The Court holds that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," but must provide the offender with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." But what, exactly, does such a "meaningful" opportunity entail? When must it occur? And what Eighth Amendment principles will govern review by the parole boards the Court now demands that States empanel? The Court provides no answers to these questions, which will no doubt embroil the courts for years.[45]

IV. *MILLER v ALABAMA*

A. INTRODUCTION

This evolution in the Court's decisions has left us ripe for the determination in *Miller v Alabama* and its

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[44] *Id.* at ___; 130 S Ct at 2044.

[45] *Id.* at ___; 130 S Ct at 2057 (citations omitted).

companion case of *Jackson v Hobbs*, both involving 14-year-old offenders convicted of murder and sentenced to mandatory life in prison without the possibility of parole.[46] The Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eight Amendment's prohibition on 'cruel and unusual punishments.' "[47] With this ruling, the *Miller* Court in part sought to resolve the ongoing dispute regarding the role and necessity of considering proportionality in sentencing.

B. THE FACTS IN *JACKSON*

Jackson, accompanied by two other minor boys, decided to rob a video store. While en route to the store, Jackson discovered that one of the boys was armed with a sawed-off shotgun. Jackson initially remained outside the store but entered while one of his cohorts was confronting the store clerk, demanding money and pointing the weapon. Jackson's cohort shot and killed the clerk following her assertion she would call the police. Arkansas prosecutors have discretion whether to charge a 14-year-old as an adult in conjunction with certain delineated offenses. The prosecutor charged Jackson with felony murder and aggravated robbery as an adult. Jackson sought to transfer his case to a juvenile court, but based on the factual circumstances, a psychiatric evaluation, and his prior juvenile history, the Arkansas trial court denied his request. The jury convicted Jackson of both crimes, and the Arkansas trial court sentenced him to life in prison without parole.[48]

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[46] *Miller*, 567 US at ___; 132 S Ct at 2460.

[47] *Id.* at ___; 132 S Ct at 2460.

[48] *Id*. at ___; 132 S Ct at 2461.

C. THE FACTS IN *MILLER*

Similarly, Miller was 14 years of age at the time he committed his crime. Miller had a history of foster-care placement premised on his mother's alcoholism and drug addiction. Evidence also indicated that his stepfather abused Miller. Miller had a history of drug and alcohol use and a series of attempted suicides. Miller and a friend were at his home when a neighbor arrived to effectuate a drug deal with Miller's mother. Miller and his cohort followed the neighbor when he returned home, and all three "smoked marijuana and played drinking games." When the neighbor passed out, Miller stole his wallet. When Miller tried to replace the wallet, the victim grabbed Miller by the throat. Miller's friend struck the victim with a baseball bat. Despite being released from the victim's grip, Miller grabbed the bat and continued to strike the victim with multiple blows to the head. Miller and his friend left but returned to the crime scene and started two fires to destroy evidence of the crime. The victim died of his injuries and smoke inhalation. While Alabama law required the prosecutor to initially charge Miller as a juvenile, the prosecutor was also permitted to remove the case to adult court. The prosecutor charged Miller as an adult with murder in the course of an arson, which carried a mandatory life sentence without parole.[49]

D. THE MAJORITY OPINION IN *MILLER*

In discussing Eighth Amendment jurisprudence, the *Miller* Court majority, with Justice Kagan authoring the opinion, noted that it had recently, in *Graham*, addressed the "concept of proportionality" as "central

[49] *Id*. at ___; 132 S Ct at 2462-2463.

to the Eighth Amendment."[50] The *Miller* majority further indicated that it "view[ed] that concept less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society."[51] The *Miller* majority reviewed "two strands of precedent reflecting our concern with proportionate punishment." The first strand "has adopted categorical bans on mismatches between the culpability of a class of offenders and the severity of a penalty."[52] The second strand "prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death."[53] The *Miller* majority found "the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment."[54]

The *Miller* majority reviewed decisions recognizing the inherent differences between juvenile and adult offenders and how these characteristics affect both the justification for and the appropriateness of imposing a life sentence without parole on a juvenile, finding, "An offender's age . . . is relevant to the Eighth Amendment, and so criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."[55] The *Miller* majority found the imposition of a mandatory sentence to be particularly subject to criticism. Specifically:

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[50] *Id.* at ___; 132 S Ct at 2463 (citation and quotation marks omitted).

[51] *Id.* at ___; 132 S Ct at 2463 (citations and quotation marks omitted).

[52] *Id.* at ___; 132 S Ct at 2463.

[53] *Id.* at ___; 132 S Ct at 2463-2464.

[54] *Id.* at ___; 132 S Ct at 2464.

[55] *Id.* at ___; 132 S Ct at 2466 (citation and quotation marks omitted).

> But the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.[56]

Highlighting the "special pertinence" of its earlier rulings, the *Miller* majority reaffirmed "that a sentencer [must] have the ability to consider the mitigating qualities of youth."[57] Emphasizing that "youth is more than a chronological fact," the *Miller* majority noted that this period of life comprised a time "when a person may be most susceptible to influence and to psychological damage," with "signature qualities" of a "transient" nature.[58] The *Miller* majority explained the flaw inherent in imposing a mandatory sentence of life in prison without parole on a juvenile, stating:

> Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14-year-olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a *greater* sentence than those adults will serve. In meting out the death penalty, the elision of all these differ-

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[56] *Id.* at ___; 132 S Ct at 2466.

[57] *Id.* at ___; 132 S Ct at 2467 (citation and quotation marks omitted).

[58] *Id.* at ___; 132 S Ct at 2467 (citation and quotation marks omitted).

> ences would be strictly forbidden. And once again, *Graham* indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison.[59]

The *Miller* majority proceeded to delineate the requirements for consideration when sentencing a juvenile for a homicide:

> [I]n imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult. To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.[60]

The *Miller* majority concluded "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment."[61] The *Miller* majority

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[59] *Id.* at ___; 132 S Ct at 2467-2468.

[60] *Id.* at ___; 132 S Ct at 2468 (citations omitted).

[61] *Id.* at ___; 132 S Ct at 2469 (citations omitted).

did reject, however, arguments for a categorical bar to sentencing juveniles to life in prison without parole, stating, "[W]e do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[62] The *Miller* majority emphasized that its decision served to

> mandate[] only that a sentence follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty. And in so requiring, our decision flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments. When both of those circumstances have obtained in the past, we have not scrutinized or relied in the same way on legislative enactments."[63]

Addressing the statutory sentencing schemes in various states, the *Miller* Court noted:

> Almost all jurisdictions allow some juveniles to be tried in adult court for some kinds of homicide. But most States do not have separate penalty provisions for those juvenile offenders. Of the 29 jurisdictions mandating life without parole for children, more than half do so by virtue of generally applicable penalty provisions, imposing the sentence without regard to age. And indeed, some of those States set no minimum age for who may be transferred to adult court in the first instance, thus applying life-without-parole mandates to children of any age—be it 17 or 14 or 10 or 6. . . . [W]e think that underscores that the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration.[64]

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[62] *Id.* at ___; 132 S Ct at 2469.

[63] *Id.* at ___; 132 S Ct at 2471.

[64] *Id.* at ___; 132 S Ct at 2473 (citations and quotation marks omitted).

Notably, the *Miller* majority found the existence of transfer statutes effectuated in some states insufficient to rectify the identified procedural problem. It recognized that "[o]f the 29 relevant jurisdictions, about half place at least some juvenile homicide offenders in adult court automatically, with no apparent opportunity to seek transfer to juvenile court."[65] According to the *Miller* majority, "Even when States give transfer-stage discretion to judges, it has limited utility" because of the absence of significant information available at that stage of the proceedings regarding the offender and the circumstances of the crime. Recognizing that "the question at transfer hearings may differ dramatically from the issue at a post-trial sentencing," the *Miller* majority noted that "transfer decisions often present a choice between extremes: light punishment as a child or standard sentencing as an adult."[66] The *Miller* majority went on to suggest that "[d]iscretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term *with* the possibility of parole or a lengthy term of years."[67]

In sum, *Miller* requires:

> [A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eight Amendment's ban on cruel and unusual punishment.[68]

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[65] *Id.* at ___; 132 S Ct at 2474.

[66] *Id.* at ___; 132 S Ct at 2474.

[67] *Id.* at ___; 132 S Ct at 2474-2475.

[68] *Id.* at ___; 132 S Ct at 2475.

E. THE *MILLER* CONCURRENCE

In his concurrence Justice Breyer, joined by Justice Sotomayor, suggested that a distinction at sentencing must inherently be drawn, similar to that used in capital cases, between those juveniles who killed and those involved in homicides but did not kill or lacked an intent to kill for the imposition of life sentences without parole. In other words, according to Justice Breyer, "the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim."[69]

F. THE *MILLER* DISSENTS

The dissent authored by Chief Justice Roberts and joined by Justices Scalia, Thomas, and Alito chastised the *Miller* majority for trying to answer "grave and challenging questions of morality and social policy" rather than "apply[ing] the law."[70] Asserting the existence of dissonance between the Court's use of the Eight Amendment "to ban a punishment that the Court does not itself characterize as unusual," Chief Justice Robert's dissent noted the inherent inconsistency of the majority's reasoning, stating:

> Put simply, if a 17-year-old is convicted of deliberately murdering an innocent victim, it is not "unusual" for the murderer to receive a mandatory sentence of life without parole. That reality should preclude finding that mandatory life imprisonment for juvenile killers violates the Eighth Amendment.[71]

Taking issue with the subjective nature of the major-

[69] *Id.* at ___; 132 S Ct at 2475-2476 (Breyer, J., concurring).

[70] *Id.* at ___; 132 S Ct at 2477 (Roberts, C.J., dissenting).

[71] *Id.* at ___; 132 S Ct at 2477.

ity's reasoning, the *Miller* dissent further argued that the current national consensus supports the practice of sentencing juveniles convicted of homicide offenses to mandatory life without parole as demonstrated by the number of jurisdictions that have enacted such legislation. The *Miller* dissent criticized the majority for ignoring this "objective indicia of society's standards" and instead, imposing "our own subjective values or beliefs."[72] Chief Justice Roberts's dissent expressed further concern regarding the overreaching nature and future implications of the majority's decision, stating, "Today's holding may be limited to mandatory sentences, but the Court has already announced that discretionary life without parole for juveniles should be 'uncommon'—or, to use a common synonym, 'unusual.' "[73] The dissent opined:

> This process has no discernible end point—or at least none consistent with our Nation's legal traditions. *Roper* and *Graham* attempted to limit their reasoning to the circumstances they addressed—*Roper* to the death penalty, and *Graham* to nonhomicide crimes. Having cast aside those limits, the Court cannot now offer a credible substitute, and does not even try. After all, the Court tells us, "none of what [*Graham*] said about children . . . is crime-specific." The principle behind today's decision seems to be only that because juveniles are different from adults, they must be sentenced differently. There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive. Unless confined, the only stopping point for the Court's analysis would be never permitting juvenile offenders to be tried as adults. Learning that an Amendment that bars only "unusual" punish-

[72] *Id.* at ___; 132 S Ct at 2477-2479 (citations and quotation marks omitted).

[73] *Id.* at ___; 132 S Ct at 2481.

> ments requires the abolition of this uniformly established practice would be startling indeed.[74]

In his dissent, Justice Alito also focused on a somewhat arbitrary age distinction between offenders, asserting:

> The category of murderers that the Court delicately calls "children" (murderers under the age of 18) consists overwhelmingly of young men who are fast approaching the legal age of adulthood. . . .
>
> Seventeen-year-olds commit a significant number of murders every year, and some of these crimes are incredibly brutal. Many of these murderers are at least as mature as the average 18-year-old.[75]

Emphasizing the sensibility of having sentencing policy remain exclusively in the realm of legislative action, Justice Alito opined:

> The Eighth Amendment imposes certain limits on the sentences that may be imposed in criminal cases, but for the most part it leaves questions of sentencing policy to be determined by Congress and the state legislatures—and with good reason. Determining the length of imprisonment that is appropriate for a particular offense and a particular offender inevitably involves a balancing of interests. If imprisonment does nothing else, it removes the criminal from the general population and prevents him from committing additional crimes in the outside world. When a legislature prescribes that a category of killers must be sentenced to life imprisonment, the legislature, which presumably reflects the views of the electorate, is taking the position that the risk that these offenders will kill again outweighs any countervailing consideration, including reduced culpability due to immaturity or the possibility of rehabilitation. When the majority of this Court countermands that democratic decision, what the majority is

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[74] *Id.* at ___; 132 S Ct at 2481-2482 (citations omitted).

[75] *Id.* at ___; 132 S Ct at 2489 (Alito, J., dissenting).

> saying is that members of society must be exposed to the risk that these convicted murderers, if released from custody, will murder again.
>
> Unless our cases change course, we will continue to march toward some vision of evolutionary culmination that the Court has not yet disclosed. The Constitution does not authorize us to take the country on this journey.[76]

While the *Miller* dissents do not provide direct guidance for resolving the issues that *Miller* creates, the dissents do serve to highlight and emphasize concerns regarding the full implication of the *Miller* decision on Michigan's juvenile sentencing scheme.

V. RETROACTIVITY

A. INTRODUCTION

A significant, and to Carp a dispositive, threshold matter to be confronted by this Court is whether *Miller* is to be given retroactive application.[77] Historically, whether to apply a decision retroactively is premised on the status of the case being on direct rather than collateral review. Direct review involves the exhaustion of state appellate proceedings, which culminates in a judgment of conviction being finalized. In accordance with federal law, a challenged state judgment is ren-

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[76] *Id*. at ___; 132 S Ct at 2490.

[77] We note that none of the parties dispute that Carp's appeal to this Court is on collateral review and was brought pursuant to MCR 6.500 *et seq*. Carp's conviction "became final when [his] time for a direct appeal expired." See *Gomez*, 295 Mich App at 414, citing *Beard v Banks*, 542 US 406, 411; 124 S Ct 2504; 159 L Ed 2d 494 (2004) (standing for the proposition that convictions are final when the availability of direct appeal is exhausted and the time for seeking a writ of certiorari has also expired). Because Carp's conviction is final, he "is entitled to relief only if a retroactive change in the law has altered the validity of his . . . conviction." *Gomez*, 295 Mich App at 414-415, citing MCR 6.500 *et seq*.

dered final upon the "conclusion of direct review or the expiration of the time for seeking such review."[78] Discussing the concept of finality in the context of direct review, the United States Supreme Court has explained:

> The text of [18 USC] 2244(d)(1)(A), which marks finality as of "the conclusion of direct review or the expiration of the time for seeking such review," consists of two prongs. Each prong—the "conclusion of direct review" and the "expiration of the time for seeking such review"—relates to a distinct category of petitioners. For petitioners who pursue direct review all the way to this Court, the judgment becomes final at the "conclusion of direct review"—when this Court affirms a conviction on the merits or denies a petition for certiorari. For all other petitioners, the judgment becomes final at the "expiration of the time for seeking such review"—when the time for pursuing direct review in this Court, or in state court, expires.[79]

In contrast, the United States Supreme Court has defined " '[c]ollateral review' " . . . "by considering the ordinary understanding of the phrase."[80] Turning to dictionary definitions, the Court stated:

> The term "collateral," in its "customary and preferred sense," means "[l]ying aside from the main subject, line of action, issue, purpose, etc.; . . . subordinate, indirect[.]" By definition, something that is "collateral" is "indirect," not direct. This suggests that "collateral" review is review that is "[l]ying aside from the main" review, *i.e.*, that is not part of direct review.

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[78] 28 USC 2244(d)(1)(A).

[79] *Gonzalez v Thaler*, 565 US ___, ___; 132 S Ct 641, 653-654; 181 L Ed 2d 619 (2012).

[80] *Wall v Kholi*, 562 US ___, ___; 131 S Ct 1278, 1284; 179 L Ed 2d 252 (2011).

> Our prior usage of the term "collateral" also supports this understanding. We have previously described a variety of proceedings as "collateral," and all of these proceedings share the characteristic that we have identified, *i.e.*, they stand apart from the process of direct review.[81]

Concomitant with a consideration of whether a case is on direct versus collateral review is the additional consideration of whether any new rule announced in the decision is substantive or procedural in nature.[82] While one would assume that such distinctions are simple to discern and apply, the Court has recognized that its decisions pertaining to "retroactivity" rendered "between 1965 and 1987" have been particularly "confusing."[83] The Court specifically stated:

> [W]e note at the outset that the very word "retroactivity" is misleading because it speaks in temporal terms. "Retroactivity" suggests that when we declare that a new constitutional rule of criminal procedure is "nonretroactive," we are implying that the right at issue was not in existence prior to the date the "new rule" was announced. But this is incorrect. As we have already explained, the source of a "new rule" is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule. What we are actually determining when we assess the "retroactivity" of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred

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[81] *Id*. at ___; 131 S Ct at 1284 (citations omitted).

[82] See *Whorton v Bockting*, 549 US 406, 416; 127 S Ct 1173; 167 L Ed 2d 1 (2007); *Teague v Lane*, 489 US 288, 305, 310; 109 S Ct 1060; 103 L Ed 2d 334 (1989); *Griffith v Kentucky*, 479 US 314, 322-323; 107 S Ct 708; 93 L Ed 2d 649 (1987).

[83] *Danforth v Minnesota*, 552 US 264, 271; 128 S Ct 1029; 169 L Ed 2d 859 (2008).

> prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.[84]

B. THE *LINKLETTER* RULE: PROSPECTIVE APPLICATION ONLY

The first time the United States Supreme Court expressly considered the issue of retroactivity was in *Linkletter v Walker*.[85] There, the Court sought to determine whether the courts should apply the *Mapp v Ohio*[86] exclusionary rule retroactively to cases on collateral review. "The Court determined that the retroactivity of *Mapp* should be determined by examining the purpose of the exclusionary rule, the reliance of the States on prior law, and the effect on the administration of justice of a retroactive application of the exclusionary rule."[87] Ultimately, using this standard the *Linkletter* Court determined that the courts should apply the exclusionary rule only prospectively.[88]

Later, in a separate opinion in *Mackey v United States*,[89] Justice Harlan asserted his belief that new rules should not, in general, be applied retroactively to cases on collateral review. He

> identified only two exceptions to his general rule of nonretroactivity . . . . First, a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe." Second, a new rule should

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[84] *Id.*

[85] *Linkletter v Walker*, 381 US 618; 85 S Ct 1731; 14 L Ed 2d 601 (1965), abrogated in part by *Davis v United States*, 564 US ___; 131 S Ct 2419 (2011).

[86] *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961).

[87] *Teague*, 489 US at 302.

[88] *Id.*

[89] *Mackey v United States*, 401 US 667; 91 S Ct 1160; 28 L Ed 2d 404 (1971) (Harlan, J., concurring in part and dissenting in part).

> be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.' "[90]

C. *GRIFFITH*: REJECTION OF THE *LINKLETTER* PROSPECTIVE-ONLY RULE

Because of difficulties in the application and the lack of consistency resulting from use of the *Linkletter* rule, the Court subsequently rejected the rule in *Griffith*.[91] The Court

> rejected as unprincipled and inequitable the *Linkletter* standard for cases pending on direct review at the time a new rule is announced, and adopted the first part of the retroactivity approach advocated by Justice Harlan. We agreed with Justice Harlan that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." We gave two reasons for our decision. First, because we can only promulgate new rules in specific cases and cannot possibly decide all cases in which review is sought, "the integrity of judicial review" requires the application of the new rule to "all similar cases pending on direct review." . . .
>
> Second, because "selective application of new rules violates the principle of treating similarly situated defendants the same," we refused to continue to tolerate the inequity that resulted from not applying new rules retroactively to defendants whose cases had not yet become final."[92]

The *Griffith* Court definitively stated, "[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on

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[90] *Teague*, 489 US at 307, quoting *Mackey*, 401 US at 692-693 (Harlan, J., concurring in part and dissenting in part) (citation omitted).

[91] *Griffith*, 479 US at 328.

[92] *Teague*, 489 US at 304 (citations omitted).

direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."[93]

D. *TEAGUE*: ADOPTION OF THE HARLAN APPROACH AND ITS EXCEPTIONS

In *Teague*, the Court "adopt[ed] Justice Harlan's view of retroactivity for cases on collateral review," stating, "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[94] The *Teague* Court expanded on and modified Justice Harlan's second exception "that a new rule should be applied retroactively if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty" ' " to mean that "the second exception . . . be reserved for watershed rules of criminal procedure," explaining:

> "Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction. For example, such, in my view, is the case with the right to counsel at trial now held a necessary condition precedent to any conviction for a serious crime."[95]

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[93] *Griffith*, 479 US at 328.

[94] *Teague*, 489 US at 310.

[95] *Id.* at 311-312, quoting *Mackey*, 401 US at 693-694.

The Court indicated a continuing concern with inequitable treatment and opined, "We can simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated."[96] Consequently, the Court held

> that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated.[97]

Years later in *Whorton v Bockting*, the Court reaffirmed its holding in *Teague*, stating, "Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review."[98] Exceptions exist, and "[a] new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[99] The Court defined a "new rule" as " 'a rule that . . . was not "*dictated* by precedent existing at the time the defendant's conviction became final." ' "[100] The Court also noted that the exception pertaining to watershed rules is both "extremely narrow" and "unlikely."[101] To qualify as a

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[96] *Teague*, 489 US at 316.

[97] *Id.*

[98] *Whorton*, 549 US at 416.

[99] *Id.* (citations omitted) (alteration in original).

[100] *Id.* (citations omitted) (alteration in original).

[101] *Id.* at 417. The Court further indicated in *Whorton*, 549 US at 419, that the only case having met this criteria was *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

"watershed rule" the Court asserted that "a new rule must meet two requirements. First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding."[102]

E. APPLYING THE UNITED STATES SUPREME COURT'S RETROACTIVITY STANDARDS

1. *MILLER* ENUNCIATES A "NEW RULE"

Applying these standards, it is uncontested that *Miller* falls within the definition of a "new rule" because it "was not *dictated* by precedent existing at the time the defendant's conviction became final."[103] "[T]here can be no dispute that a decision announces a new rule if it expressly overrules a prior decision . . . ."[104] While not contested, the characterization of the *Miller* decision as comprising a new rule is of importance because

> [w]hen a decision of this Court results in a "new rule," that rule applies to all criminal cases still pending on direct review. As to convictions that are already final, however, the rule applies only in limited circumstances. New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish. Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' " or faces a punishment that the law cannot impose upon him.

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[102] *Whorton*, 549 US at 418 (citations and quotation marks omitted).

[103] *Id.* at 416 (citations and quotation marks omitted).

[104] *Graham*, 506 US at 467.

> New rules of procedure, on the other hand, generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." That a new procedural rule is "fundamental" in some abstract sense is not enough; the rule must be one "without which the likelihood of an accurate conviction is *seriously* diminished." This class of rules is extremely narrow, and "it is unlikely that any . . . 'ha[s] yet to emerge.' "[105]

There is no dispute within this Court, by the litigants involved in this appeal or premised in federal law that *Miller* is applicable to all cases "pending on direct review or not yet final."[106] What remains for this Court to determine is whether *Miller* is also to be applied retroactively to those cases on collateral review.

2. *MILLER*'S NEW RULE IS PROCEDURAL

Having determined that *Miller* comprises a new rule, the next step in the analysis is for this Court to discern whether the new rule is substantive or procedural in nature and, if procedural, whether it falls within a recognized exception to the rule of nonretroactivity. As noted, our decision whether *Miller* is to be applied retroactively to cases on collateral review will be dispositive of Carp's appeal. Carp's appeal is, without question, before us on collateral review. If *Miller*'s new rule is substantive, we can apply it retroactively in such

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[105] *Schriro v Summerlin*, 542 US 348, 351-352; 124 S Ct 2519; 159 L Ed 2d 442 (2004) (citations omitted) (alteration in orginal).

[106] *Teague*, 489 US at 304-305; see also *Davis v United States*, 564 US ___; 131 S Ct 2419, 2430; 180 L Ed 2d 285 (2011).

collateral review to consider the merits of Carp's appeal. If, however, *Miller*'s new rule is procedural only and fails to meet any of the delineated *Teague* exceptions, then we cannot apply it retroactively to Carp's appeal.

While the "distinction between substance and procedure is an important one,"[107] it is not necessarily always a simple matter to divine.[108] The United States Supreme Court has indicated that decisions of "criminal procedure" encompass those which implicate the functioning of the criminal trial process. Retroactivity of new procedural rules is severely limited, as only substantive new rules or decisions of "procedure" that incorporate into the criminal trial process a mechanism " 'without [which] the likelihood of an accurate conviction is seriously diminished,' " referred to as "watershed rules," are to be applied retroactively.[109] Only these two exceptions have been identified to the "general rule of nonretroactivity for cases on collateral review."[110] In summary, as described by the *Teague* Court:

> First, a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Second, a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.' "[111]

Decisions characterized as comprising "substantive criminal law" extend beyond issues of procedural function and address the meaning, scope, and application of

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[107] *Bousley v United States*, 523 US 614, 620; 118 S Ct 1604; 140 L Ed 2d 828 (1998).

[108] *Robinson v Neil*, 409 US 505, 509; 93 S Ct 876; 35 L Ed 2d 29 (1973).

[109] *Bousley*, 523 US at 620, quoting *Teague*, 489 US at 313.

[110] *Teague*, 489 US at 307.

[111] *Id.* (citations omitted).

substantive criminal statutes.[112] In contrast, *Teague* has established that a new rule is procedural if it affects the operation of the criminal trial process.[113] By way of clarification: "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural."[114]

Examining *Miller*'s language and historical precedents, we find that it is procedural in nature. We recognize that *Roper* and *Graham* "establish[ed] that children are constitutionally different from adults for purposes of sentencing."[115] And unlike its predecessors, *Miller* specifically eschews a categorical ban on sentencing juveniles to life in prison without parole.[116] The *Miller* Court indicated that its ruling was procedural in nature, stating, "Our decision *does not categorically bar* a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it *mandates only that a sentence follow a certain process*—considering an offender's youth and attendant characteristics—before imposing a particular penalty."[117] Targeted prohibitions are by definition less restrictive than a categorical ban.[118] While the *Miller* Court opined that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncom-

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[112] *Bousley*, 523 US at 620; see also *Davis v United States*, 417 US 333, 346; 94 S Ct 2298; 41 L Ed 2d 109 (1974) (indicating that included within the definition of "substantive" are those decisions that remove primary conduct from the purview of criminal punishment).

[113] *Bousley*, 523 US at 620.

[114] *Schriro*, 542 US at 353 (citations omitted).

[115] *Miller*, 567 US at ___; 132 S Ct at 2464.

[116] *Id.* at ___; 132 S Ct at 2459, 2469.

[117] *Id.* at ___; 132 S Ct at 2471 (emphasis added).

[118] *United States v Playboy Entertainment Group, Inc*, 529 US 803, 815; 120 S Ct 1878; 146 L Ed 2d 865 (2000).

mon," it specifically did not "foreclose a sentencer's ability to make that judgment in homicide cases . . . ."[119] When stating its ruling, the Court reiterated:

> Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty. And in so requiring, our decision flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments.[120]

Consistently with the Court's reference to and reliance on its earlier decisions, *Graham* justified and distinguished its imposition of a categorical ban of a mandatory sentence of life without parole for nonhomicide offenders by indicating:

> The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. There is a line "between homicide and other serious violent offenses against the individual." Serious nonhomicide crimes "may be devastating in their harm . . . but 'in terms of moral depravity and of the injury to the person and to the public,' . . . they cannot be compared to murder in their 'severity and irrevocability.' " This is because "[l]ife is over for the victim of the murderer," but for the victim of even a very serious nonhomicide crime, "life . . . is not over and normally is not beyond repair." Although an offense like robbery or rape is "a serious crime deserving serious punishment," those crimes differ from homicide crimes in a moral sense.[121]

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[119] *Miller*, 567 US at ___; 132 S Ct at 2469.

[120] *Id.* at ___; 132 S Ct at 2471.

[121] *Graham*, 560 US at ___; 130 S Ct at 2027 (citations omitted).

In *Graham*, the Court drew a line and distinguished between homicide and nonhomicide juvenile offenders and the sentences that could be imposed in conformance with the Eighth Amendment. That distinction was reasserted in the *Miller* Court's refusal to impose a categorical ban regarding the sentencing of juvenile homicide offenders to life in prison without parole.

Our determination that *Miller* does not comprise a substantive new rule and, therefore, is not subject to retroactive application for cases on collateral review is supported by the fact that the ruling does not place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."[122] *Miller* does not alter the elements necessary for a homicide conviction. Rather it simply necessitates the consideration of certain factors, when juveniles are involved, in sentencing. In other words, *Miller* is not substantive because it does not serve to "alter[] the range of conduct or the class of persons that the law punishes,"[123] but merely the manner in which a punishment may be imposed. Juveniles can still be subject to a sentence of life in prison without parole. It is simply the manner and factors to be considered in the imposition of that particular sentence that *Miller* dictates, rendering the ruling procedural and not substantive in nature.

3. *MILLER* IS NOT A WATERSHED RULE OF LAW

This does not, however, end our inquiry. While *Miller* does not meet the substantive exception recognized in *Teague*, a second exception exists, which may render a new procedural rule retroactive on collateral review. "A

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[122] *Teague*, 489 US at 307 (citation and quotation marks omitted).

[123] *Schriro*, 542 US at 353.

new rule applies retroactively in a collateral proceeding only if . . . the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[124] "In order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding."[125] In applying these requirements, it is instructive to review *Gideon v Wainwright*,[126] as it comprises the only case to date "identified as qualifying under the [watershed] exception."[127] The *Gideon* Court "held that counsel must be appointed for any indigent defendant charged with a felony. When a defendant who wishes to be represented by counsel is denied representation, *Gideon* held, the risk of an unreliable verdict is intolerably high. The new rule announced in *Gideon* eliminated this risk."[128]

The *Miller* ruling fails to satisfy the initial requirement pertaining to an "impermissibly large risk of an inaccurate conviction."[129] *Miller* deals exclusively with sentencing and does not pertain to criminal trial procedures leading to conviction. *Miller* is focused solely on accuracy in sentencing and does not address or impinge on the accuracy of a juvenile defendant's conviction for a homicide offense. Addressing the second criteria that a watershed rule "must alter our understanding of the

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[124] *Whorton*, 549 US at 416, citing *Saffle v Parks*, 494 US 484, 495; 110 S Ct 1257; 108 L Ed 2d 415 (1990), quoting *Teague*, 489 US at 311.

[125] *Whorton*, 549 US at 418 (citations and quotation marks omitted).

[126] *Gideon*, 372 US at 335.

[127] *Whorton*, 549 US at 419.

[128] *Id.*

[129] *Id.* at 418.

bedrock procedural elements essential to the fairness of a proceeding,"[130] the decision in *Miller* is not comparable to the rule the Court announced in *Gideon*. The *Miller* ruling has a more restrictive scope of application and does not relate to the accuracy of the fact-finding process.[131] Further, this second requirement to establish a watershed rule "cannot be met simply by showing that a new procedural rule is based on a 'bedrock' right."[132]

The United States Supreme Court has consistently found "that the *Teague* bar to retroactivity applies to new rules that are based on 'bedrock' constitutional rights" and "[t]hat a new procedural rule is 'fundamental' in some abstract sense is not enough."[133] Specifically, "in order to meet this requirement, a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding. In applying this requirement, we again look to the example of *Gideon*, and 'we have not hesitated to hold that less sweeping and fundamental rules' do not qualify."[134] While *Miller* will indisputably have an effect on sentencing procedures for juveniles, it cannot be construed to qualify as being "in the same category with *Gideon* [in having] effected a profound and sweeping change."[135]

We must address one final issue of federal law before finalizing our determination on retroactivity. Carp and the amici curiae contend that the *Miller* Court impliedly rendered its decision retroactive through the

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[130] *Id.* at 418 (citations and quotation marks omitted).

[131] *Id.* at 419.

[132] *Id.* at 420-421.

[133] *Id.* at 421 (citations and quotation marks omitted).

[134] *Id.* (citations omitted).

[135] *Id.* (citations and quotation marks omitted).

remand of the companion case of *Jackson v Hobbes*, which they assert was clearly before the Court on collateral review. State convictions and sentences are final "for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied."[136] Specifically, Carp contends that in the companion case, Jackson had fully expended his appellate rights because the Arkansas Supreme Court had affirmed his convictions and, subsequently, dismissed his petition for habeas corpus.[137] Yet the *Miller* Court granted certiorari to both *Miller* and *Jackson*.[138]

Contrary to Carp's contention, the mere fact that the Court remanded Jackson for resentencing does not constitute a ruling or determination on retroactivity. Specifically:

> The only way the Supreme Court can, by itself, "lay out and construct" a rule's retroactive effect, or "cause" that effect "to exist, occur, or appear," is through a holding. The Supreme Court does not "ma[k]e" a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to lower courts. In such an event, any legal conclusion that is derived from the principles is developed by the lower court (or perhaps by a combination of courts), not by the Supreme Court. We thus conclude that a new rule is not "made retroactive to cases on collateral review" unless the Supreme Court holds it to be retroactive.[139]

In addition:

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[136] *Caspari v Bohlen*, 510 US 383, 390; 114 S Ct 948; 127 L Ed 2d 236 (1994).

[137] *Miller*, 567 US at ___; 132 S Ct at 2461.

[138] *Id.* at ___; 132 S Ct at 2463.

[139] *Tyler v Cain*, 533 US 656, 663; 121 S Ct 2478; 150 L Ed 2d 632 (2001).

> [t]he nonretroactivity principle *prevents* a federal court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final. A threshold question in every habeas case, therefore, is whether the court is obligated to apply the *Teague* rule to the defendant's claim. We have recognized that the nonretroactivity principle "is not 'jurisdictional' in the sense that [federal courts] . . . must raise and decide the issue *sua sponte*." Thus, a federal court may, but need not, decline to apply *Teague* if the State does not argue it. But if the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply *Teague* before considering the merits of the claim.[140]

This is consistent with the Court's determination in *Schiro v Farley*, which provides:

> Nevertheless, the State failed to argue *Teague* in its brief in opposition to the petition for a writ of certiorari. In deciding whether to grant certiorari in a particular case, we rely heavily on the submissions of the parties at the petition stage. If, as in this case, a legal issue appears to warrant review, we grant certiorari in the expectation of being able to decide that issue. Since a State can waive the *Teague* bar by not raising it, and since the propriety of reaching the merits of a dispute is an important consideration in deciding whether or not to grant certiorari, the State's omission of any *Teague* defense at the petition stage is significant. Although we undoubtedly have the discretion to reach the State's *Teague* argument, we will not do so in these circumstances.[141]

In *Jackson*, because the State did not raise the issue of retroactivity, the necessary predicate for the Court to resolve the question of retroactivity was waived. Hence,

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[140] *Caspari*, 510 US at 389 (citations omitted).

[141] *Schiro v Farley*, 510 US 222, 229; 114 S Ct 783; 127 L Ed 2d 47 (1994) (citations omitted).

merely because *Jackson* was before the Court on collateral review is not dispositive on the issue of retroactivity.

4. *MILLER* IS NOT APPLICABLE UNDER MICHIGAN LAW TO CASES ON COLLATERAL REVIEW

Before concluding our analysis that *Miller* is not retroactive under federal law, we must also address whether Michigan law would require its retroactive application. At the outset, we note, "A state may accord broader effect to a new rule of criminal procedure than federal retroactivity jurisprudence accords."[142] We also note that the Michigan Supreme Court has stated, "Michigan law has regularly declined to apply new rules of criminal procedure to cases in which a defendant's conviction has become final."[143] Our Supreme Court has delineated three factors in determining the retroactivity of a new rule of criminal procedure: "(1) the purpose of the new rule[]; (2) the general reliance on the old rule[;] and (3) the effect of retroactive application of the new rule on the administration of justice."[144] Addressing the "purpose prong" as the first of the three factors to be considered, our Supreme Court has stated that "a law may be applied retroactively when it ' "concerns the ascertainment of guilt or innocence" ' "; however, " ' "a new rule of procedure . . . which does not affect the integrity of the fact-finding process should be given prospective effect." ' "[145] Because *Miller* is not concerned with "the ascertainment of guilt or innocence"

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[142] *People v Maxson*, 482 Mich 385, 392; 759 NW2d 817 (2008), citing *Danforth*, 552 US at 287-288.

[143] *Maxson*, 482 Mich at 392-393.

[144] *Id.* at 393 (citation and quotation marks omitted).

[145] *Id.*, quoting *People v Sexton*, 458 Mich 43, 63; 580 NW2d 404 (1998), quoting *People v Young*, 410 Mich 363, 367; 301 NW2d 803 (1981).

and "does not affect the integrity of the fact-finding process,"[146] this first prong militates against retroactivity.

Under the second prong, "a defendant who relied on the old rule . . . must also have *suffered actual harm* . . . ."[147] While undoubtedly some defendants could receive sentencing relief should we apply *Miller* retroactively, "this would be true of extending *any* new rule retroactively, yet this is not generally done."[148] In this instance, there is no guarantee that Carp or any defendant would receive relief because *Miller* is not a categorical ban of life-without-parole sentences. Our Supreme Court implies that even if this prong is favorable to a defendant, it is not dispositive to the issue of retroactivity. "Instead, we must consider, as best as possible, the extent of the detrimental reliance on the old rule, and then balance this against the other *Sexton* factors, as well as against the fact that each defendant . . . has received all the rights under the law to which he or she was entitled at the time."[149]

Our Supreme Court has indicated that the final prong pertaining to the effect of retroactive application on the administration of justice involves a determination of whether "[t]he state's strong interest in finality of the criminal justice process would be undermined . . . ."[150] Citing federal decisions, the *Maxson* Court opined:

> "[F]inality of state convictions is a *state* interest . . . that States should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a

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[146] *Maxson*, 482 Mich at 393 (citations and quotation marks omitted).

[147] *Id.* at 396.

[148] *Id.* at 397.

[149] *Id.*

[150] *Id.* at 397.

> remedy for a violation of federal rights by their lower courts." The principle of finality "is essential to the operation of our criminal justice system." The state's interest in finality discourages the advent of new rules from "continually forc[ing] the State[ ] to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards[.]"[151]

While undoubtedly retroactive application could result in a number of juveniles convicted of homicide and sentenced under the mandatory scheme of life in prison without parole to some relief if resentenced, there exists a commensurate concern regarding the effect of these potential appeals on our limited judicial resources. Consistent with our Supreme Court's decision in *Maxson*, "it is our judgment that those resources would be better preserved for defendants currently charged [or pending on direct review]—some of whom may be . . . entitled to relief . . . ."[152] Particularly when viewed in conjunction with our determination under federal law, we find that under Michigan law *Miller* is not subject to retroactive application to cases on collateral review.

Finally, while lacking precedential value, we note that Florida appellate courts have recently reached the same conclusion regarding the retroactive application of *Miller* to cases on collateral review.[153] While the analysis of the Florida courts is of limited value as relying almost exclusively on state law, we find the reasoning, analysis, and ultimate conclusions to be instructive and consistent with that of this Court.[154]

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[151] *Id.* at 398 (citations omitted).

[152] *Id.* at 398-399.

[153] *Geter v State*, ___ So 3d ___ (Fla App, 2012) (opinion issued September 27, 2012, in Case No. 3D12-1736); see also *Gonzalez v State*, 101 So 3d 886 (Fla App, 2012).

[154] *People v Conrad*, 148 Mich App 433, 439; 385 NW2d 277 (1986).

VI. APPLICATION OF *MILLER* TO SENTENCING IN MICHIGAN

A. INTRODUCTION

We recognize that the ultimate authority to determine penalties for criminal offenses is constitutionally vested in the Legislature,[155] while the authority to impose sentences and to administer statutory law governing sentencing that the Legislature enacts lies with the judiciary.[156] We also readily acknowledge that "a court's constitutional obligation is to interpret, not rewrite, the law" and that "[a]ny responsibility to rewrite the statutes lies with the Legislature."[157] While cognizant of our role, we also recognize our duty to the trial courts that will face sentencing issues in pending cases and which can be anticipated on remand. We must, we believe, provide guidance to these trial courts to ensure a consistency of approach until the Legislature can respond by reworking the sentencing scheme for juveniles in Michigan to be in accord with *Miller*. We urge the Legislature to take up its task quickly in this matter. But we find it unacceptable in the interim to simply remand cases to the trial courts for resentencing. Without such guidance, the trial courts will be caught between the *Miller* Court's ruling that a mandatory life sentence without parole for a juvenile convicted of homicide is constitutionally defective while simultaneously required by the current statutory scheme in Michigan to impose such a sentence. We therefore provide the following to ensure individualized sentencing for juveniles convicted of homicide, while simultaneously affording a standardized methodology

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[155] Const 1963, art 4, § 45.

[156] See MCL 769.1(1).

[157] *Salter v Patton*, 261 Mich App 559, 565-566; 682 NW2d 537 (2004) (citations and quotation marks omitted).

for the lower courts to implement pending the action of our Legislature. In doing so, this Court seeks to minimize its intrusion and to leave the smallest footprint possible on any legislative function.

B. *MILLER*'S PARAMETERS

Because we "are bound by the decisions of the United States Supreme Court construing federal law,"[158] it is important to delineate the exact parameters of *Miller* in order to determine the means to best carry out the *Miller* decision while commensurately obtaining the least disruption to our sentencing system for juveniles. Consistent with *Graham*, the *Miller* Court's ruling requires "sentencing authorities consider the characteristics of a [juvenile] defendant and the details of his offense before sentencing him . . . ."[159] Specifically, "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole."[160]

The brunt of the *Miller* Court's criticism of mandatory sentencing schemes of life imprisonment without parole for juveniles is that such schemes "prevent[] those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties."[161] To achieve the goal of individualized sentencing for juveniles, the *Miller* Court

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[158] *Jaqua v Canadian Nat'l R, Inc*, 274 Mich App 540, 546; 734 NW2d 228 (2007) (quotation marks omitted), citing *Chesapeake & O R Co v Martin*, 283 US 209, 220-221; 51 S Ct 453; 75 L Ed 983 (1983).

[159] *Miller*, 567 US at ___; 132 S Ct at 2463-2464.

[160] *Id.* at ___; 132 S Ct at 2465.

[161] *Id.* at ___; 132 S Ct at 2460, quoting *Graham*, 130 S Ct at 2026-2027, 2029-2030.

repeatedly emphasized the necessity for "sentencing authorities [to] consider the characteristics of a defendant and the details of his offense before sentencing . . . ."[162] Having found that " '[a]n offender's age' . . . 'is relevant to the Eighth Amendment,' " the *Miller* Court explicitly determined that " 'criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.' "[163]

This does not, however, imply that a sentencing court has unfettered discretion when sentencing a juvenile. Rather, the focus is on the discretion of the sentencer to determine whether to impose the harshest penalty of life without the possibility of parole on a juvenile convicted of a homicide offense. Specifically, the *Miller* Court stated:

> But the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.
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> And *Graham* makes plain these mandatory schemes' defects in another way: by likening life-without-parole sentences imposed on juveniles to the death penalty itself. Life-without-parole terms, the Court wrote, "share some characteristics with death sentences that are shared by no other sentences." Imprisoning an offender until he dies alters the remainder of his life "by a forfeiture that is irrevocable." And this lengthiest possible incarceration is

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[162] *Miller*, 567 US at ___; 132 S Ct at 2463-2464.

[163] *Id.* at ___; 132 S Ct at 2466, quoting *Graham*, 130 S Ct at 2031.

> an "especially harsh punishment for a juvenile," because he will almost inevitably serve "more years and a greater percentage of his life in prison than an adult offender." The penalty when imposed on a teenager, as compared with an older person, is therefore "the same . . . in name only." All of that suggested a distinctive set of legal rules: In part because we viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment. We imposed a categorical ban on the sentence's use, in a way unprecedented for a term of imprisonment. And the bar we adopted mirrored a proscription first established in the death penalty context—that the punishment cannot be imposed for any nonhomicide crimes against individuals.
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> That correspondence—*Graham's* "[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment,"—makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty. [W]e [have] held that a statute mandating a death sentence for first-degree murder violated the Eighth Amendment. We thought the mandatory scheme flawed because it gave no significance to "the character and record of the individual offender or the circumstances" of the offense, and "exclud[ed] from consideration . . . the possibility of compassionate or mitigating factors." Subsequent decisions have elaborated on the requirement that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses.[164]

This language indicates that the *Miller* Court is directing that sentencing courts not impose "the harshest term of imprisonment," life without possibility of parole, on juveniles without having first determined if such a sentence is appropriate based on the offender's youth and the circumstances applicable to the particular case to ensure an individualized and proportionate

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[164] *Miller*, 567 US at ___; 132 S Ct at 2466-2467.

sentence. Contrary to the arguments of the amici curiae and Carp in response to this Court's request to address procedural or application issues in juvenile sentencing in their briefs, the *Miller* Court does not require Michigan or other states with similar mandatory sentencing schemes to abrogate or abandon a hierarchical methodology of sentencing for those convicted of first-degree murder or to necessitate a term of years sentence consistent with a lesser offense, such as second-degree murder. Instead, a sentencing court must, considering factors of youth, have the discretion to determine whether a juvenile convicted of homicide will have imposed on him or her the harshest penalty of life in prison without parole or be entitled to life in prison with the possibility of parole.

We base this conclusion on several factors. First, the *Miller* Court in its reliance on *Roper* and *Graham* emphasized:

> [O]ur individualized sentencing cases alike teach that *in imposing a State's harshest penalties*, a sentencer misses too much if he treats every child as an adult. To recap: *Mandatory life without parole* for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.
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> * * *
>
> We therefore hold that the *Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole* for juvenile offenders. By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. *Because that holding is sufficient to decide these cases, we do not consider* Jackson's and Miller's alternative *argument that the Eighth Amendment requires a categorical bar on life*

> *without parole for juveniles*, or at least for those 14 and younger. But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Although *we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison*.[165]

Second, this is consistent with the Court's explication of its holding in *Graham*, where it distinguished between "defendants who do not kill, intend to kill, or foresee that life will be taken" as being less deserving "of the most serious forms of punishment" from those juveniles who are "murderers."[166] It would, therefore, be inconsistent to sentence juveniles who commit murder to a sentence that is not proportional to the severity of the crime. In addition, the *Graham* Court clearly stated:

> *A State is not required to guarantee eventual freedom* to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants . . . some *meaningful opportunity to obtain release* based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide of-

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[165] *Id.* at ___; 132 S Ct at 2468, 2469 (citations omitted, emphasis added).

[166] *Graham*, 560 US at ___; 130 S Ct at 2027.

> fender, *it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives*. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.[167]

Finally, first-degree murder is consistently acknowledged as "the most serious of offenses."[168] Concomitant with the severity of the offense is the proportionality of the punishment. "The Eighth Amendment's history and the development of its decisional law firmly support the conclusion that length of imprisonment can be sufficiently disproportionate to the underlying crime to be cruel and unusual punishment."[169] "['I]t is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' "[170]

But proportionality is a two-edge sword. A sentence may not be so severe that it constitutes cruel and unusual punishment given the circumstances or severity of the offense. On the other hand, a sentence may not be so light that the punishment fails to fit the serious nature of the crime:

> There is no judicial function which makes larger drafts upon the fairness, common sense, sanity, and good judgment of the judge than that of fixing penalties for criminal

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[167] *Id.* at ___; 130 S Ct at 2030 (emphasis added).

[168] *Lambert v Blodgett*, 393 F3d 943, 956 (CA 9, 2004); see also *Lizama v United States Parole Comm*, 245 F3d 503, 505 (CA 5, 2001); *Baggett v Keller*, 796 F Supp 2d 718, 730 (ED NC, 2011).

[169] *Carmona v Ward*, 576 F2d 405, 420 (CA 2, 1978).

[170] *Atkins v Virginia*, 536 US 304, 311; 122 S Ct 2242; 153 L Ed 2d 335 (2002), quoting *Weems v United States*, 217 US 349; 30 S Ct 544; 54 L Ed 793 (1910).

> offenses, nor one which more vitally affects the stability of free institutions. Excessive penalties are tyrannical in the court, and abhorrent to the public; on the other hand, penalties unduly mild seriously embarrass law enforcement and encourage infractions of the criminal laws.[171]

Consequently, under *Miller* the provision of discretion in sentencing to achieve an individualized result does not equate to unlimited or unfettered authority to impose any type of penalty. While individualized with regard to considerations of youth, any sentence imposed on a juvenile convicted of homicide must also recognize the severity of the offense committed, resulting in a sentence that accordingly reflects the severity of the offense.

We specifically reject the contention that an appropriate alternative would be to sentence a convicted juvenile homicide offender to a term of years consistent with second-degree murder as the next step in penalty gradation from first-degree murder. While not absolute, in many cases involving first-degree murder a sentencing court also instructs the finder of fact on second-degree murder as a lesser included offense.[172] In these instances, when a jury determines that the juvenile is guilty of first-degree murder, it has rejected the possibility that he or she is guilty of the lesser offense. When a jury has had the option and specifically rejected attribution of guilt to a lower level offense, any failure to recognize and afford weight to the jury's verdict by imposing a penalty inconsistent with the level of offense that the jury determines as the basis for the verdict of guilt would offend the premise of proportionality in seeking to ensure that the punishment imposed fits the crime.

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[171] *Hawkins v United States*, 14 F2d 596, 598 (CA 7, 1926).

[172] See *People v Cornell*, 466 Mich 335, 358 n 13; 646 NW2d 127 (2002) (nothing that an instruction on second-degree murder, as a lesser included offense of first-degree murder, is not automatically required).

C. A PERFECT STORM: THE MICHIGAN SENTENCING SCHEME FOR JUVENILES WHO COMMIT HOMICIDE

There are three Michigan statutes that intersect to create an unconstitutional perfect storm under *Miller*. Those statutes are: MCL 750.316(1), mandating a life sentence for any person convicted of first-degree murder; MCL 769.1(1)(g), requiring courts to sentence any juvenile convicted of first-degree murder in the same manner as an adult; and MCL 791.234(6)(a), excluding any prisoner serving a life sentence for first-degree murder from eligibility for parole. In our view, however, all the statutes are not unconstitutional under *Miller*. Rather, as we explain below, only one of them is: MCL 791.234(6)(a), which provides that a prisoner sentenced to life imprisonment for first-degree murder "is not eligible for parole."

D. MEETING *MILLER*'S REQUIREMENTS IN MICHIGAN

To fulfill the strictures of *Miller* sentencing courts are required to determine, considering the factors of youth and the serious nature of the offense, whether to sentence the juvenile convicted of a homicide offense to life without the possibility of parole or to sentence such a juvenile offender to a life sentence with the potential for parole. To fulfill this mandate and as a consequence of this opinion, we find that the current statutory provision, MCL 791.234(6)(a), which provides that a prisoner sentenced to life imprisonment for first-degree murder "is not eligible for parole" to be unconstitutional as written and as applied to juvenile offenders convicted of homicide. This statute fails to acknowledge a sentencing court's discretion to determine that a convicted juvenile homicide offender may be eligible for parole.

Miller also provides direction regarding the factors a sentencing court should consider. While not inclusive, the *Miller* Court specifically indicates factors to be considered at sentencing to include: (a) "the character and record of the individual offender [and] the circumstances of the offense,"[173] (b) "the chronological age of the minor,"[174] (c) "the background and mental and emotional development of a youthful defendant,"[175] (d) "the family and home environment,"[176] (e) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected [the juvenile],"[177] (f) whether the juvenile "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth,"[178] and (g) the potential for rehabilitation.[179] It is important to recognize that the trial court must consider these factors at the time of sentencing in determining the eligibility for parole. Discretion by the trial court at the outset of proceedings in determining whether to try a juvenile as an adult is not sufficient to meet the mandate.[180] The *Miller* Court indicated the importance of the timing of the considerations of youth, stating that "the question at transfer hearings may differ dramatically from the issue at a post-trial sentencing" and noting that "[d]iscretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a

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[173] *Miller*, 567 US at ___; 132 S Ct at 2467 (citation and quotation marks omitted).

[174] *Id.* at ___; 132 S Ct at 2467.

[175] *Id.* at ___; 132 S Ct at 2467.

[176] *Id.* at ___; 132 S Ct at 2468.

[177] *Id.* at ___; 132 S Ct at 2468.

[178] *Id.* at ___; 132 S Ct at 2468.

[179] *Id.* at ___; 132 S Ct at 2468.

[180] *Id.* at ___; 132 S Ct at 2474.

life-without-parole sentence, a lifetime prison term *with* the possibility of parole or a lengthy terms of years."[181] Specifically, "the discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court—and so cannot satisfy the Eighth Amendment."[182]

While *Miller* does not guarantee a convicted juvenile homicide offender parole, *Miller* and its predecessors do mandate that a meaningful review and consideration must be afforded by the sentencing court, which has at least the potential to be realized. Carp and the amici curiae raise legitimate concerns about whether the court's discretion in sentencing a juvenile homicide offender to life with the possibility of parole will actually result in a meaningful review by the Parole Board premised on its "life means life" policy.[183] We acknowledge that the release of a prisoner on parole is discretionary by the Parole Board,[184] and, based on that discretion, a prisoner does not possess a protected liberty interest in being paroled before the expiration of his or her sentence.[185] Since 1982, legislative changes have occurred affecting not only the structure and composition of the Parole Board, but also "the procedure for paroling inmates sentenced to parolable life."[186] Historically:

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[181] *Id.* at ___; 132 S Ct at 2474-2475.

[182] *Id.* at ___; 132 S Ct at 2475.

[183] See *People v Scott*, 480 Mich 1019; 743 NW2d 62 (2008) (MARILYN KELLY, J., dissenting).

[184] *In re Parole of Johnson*, 235 Mich App 21, 24-25; 596 NW2d 202 (1999).

[185] *Crump v Lafler*, 657 F3d 393, 404 (CA 6, 2011) ("There is no legitimate claim of entitlement to parole [in Michigan], and thus no liberty interest in parole.") (citation and quotation marks omitted).

[186] *Foster v Booker*, 595 F3d 353, 357 (CA 6, 2010).

Until 1982, inmates sentenced to parolable life could expect an initial interview with the Board after having served seven years, with subsequent interviews "at no greater than 36-month intervals following the initial interview" . . . . In 1982, the Michigan Legislature amended the law to require the initial interview at the four-year mark with subsequent interviews "biennially thereafter" . . . . The Legislature changed the law again a decade later such that, as of 1992, a Board member is not statutorily required to interview an inmate sentenced to parolable life before the inmate comes within the Board's jurisdiction. Rather, the initial interview is required only after the inmate has served ten years. Moreover, as of 1992, the inmate could expect to be reinterviewed as infrequently as every five years, . . . not every two or three years as had been the previous practice.

In 1999, the Legislature eliminated the statutory reinterview requirement altogether. As a result, as of 1999, a Board member need only interview an inmate sentenced to parolable life after the inmate has served ten years. Interviews take place "thereafter as determined by the" Board. Rather than requiring regular reinterview of an inmate, the statute now requires the Board to *review* the inmate's paper file at five-year intervals. . . . [H]owever, . . . in practice, the Board exercises its discretion to reinterview an inmate every ten years following the initial ten-year interview.

Legislative changes in 1999 also curtailed an inmate's right to judicial review of the denial of parole. The Legislature had made an inmate's right to appeal explicit in 1982 by providing that the "action of the parole board in granting or denying a parole shall be appealable to the circuit court." Before 1982, the law had provided only that the Board's action of releasing an inmate was "not . . . reviewable if in compliance with law." As a result of the 1999 amendments, only the prosecutor or the victim of an inmate's crime has a statutory right to appeal the Board's decision to grant parole.

. . . [I]n the 1990s the Board stopped providing written reasons to explain its lack of interest in moving an inmate

> forward to a public hearing. This change appears to have been within the statutory discretion of the Board. Since 1982, Michigan law has required that "[w]hen the parole board makes a final determination not to release a prisoner, the prisoner shall be provided with a written explanation of the reason for denial." The Michigan Court of Appeals in 2001, by interpreting "final determination" to mean determinations that had progressed through all the steps in the parole eligibility process, refused to require a written explanation at the "no interest" stage.[187]

Concerns regarding the Parole Board's exercise of discretion may also necessitate the involvement of our Legislature to study the current Parole Board procedure and ascertain whether it will require adaptation following *Miller*. We recognize that "the determination of parole eligibility is a separate phase of the criminal justice process . . . ."[188] But the Parole Board cannot effectively ignore the determination of the sentencing court and must respect its decision following conviction of a juvenile homicide offender to life with the possibility of parole. In an earlier decision, the United States Supreme Court explained that

> where parole is concerned discretion, by its very definition, is subject to changes in the manner in which it is informed and then exercised. The idea of discretion is that it has the capacity, and the obligation, to change and adapt based on experience. New insights into the accuracy of predictions about the offense and the risk of recidivism consequent upon the offender's release, along with a complex of other factors, will inform parole decisions.[189]

Along with the sentencing court, the Parole Board must truly exercise the discretion granted to it and not

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[187] *Id.* at 357-358 (citations omitted).

[188] See *Augustine v Brewer*, 821 F2d 365, 369 n 2 (CA 7, 1987).

[189] *Garner v Jones*, 529 US 244, 253; 120 S Ct 1362; 146 L Ed 2d 236 (2000).

abdicate its responsibility by the automatic imposition, in the case of juvenile homicide offenders, of its "life means life" policy. *Miller* necessitates the sentencing court's exercise of discretion in determining whether to sentence a juvenile homicide offender to life in prison with the possibility of parole. And logic dictates that to effectuate the sentence that the sentencing court imposes, the Parole Board must respect the sentencing court's decision by also providing a meaningful determination and review when parole eligibility arises.

We must address a further important discrepancy between *Miller* and our current sentencing scheme for juveniles in Michigan. That discrepancy involves the very definition of who qualifies as a juvenile. *Miller* defines juvenile as comprising "those under the age of 18 at the time of their crimes . . . ."[190] The same definition is evident in *Graham*'s acknowledgement that "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood, those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime."[191] But Michigan defines a juvenile as below the age of 17. Specifically, MCR 6.903(E) defines "juvenile" as "a person 14 years of age or older, who is subject to the jurisdiction of the court for having allegedly committed a specified juvenile violation on or after the person's 14th birthday and before the person's 17th birthday." Similarly, MCL 600.606(1) defines a juvenile as "14 years of age or older and less than 17 years of age," while MCL 764.27 references "a child less than 17 years of age." Consequently, to adhere to *Miller*, sentencing of a juvenile

[190] *Miller*, 567 US at ___; 132 S Ct at 2460.

[191] *Graham*, 560 US at ___; 130 S Ct at 2030, quoting *Roper*, 543 US at 574 (quotation marks omitted).

requires that those individuals between 17 and 18 years of age also be subject to the strictures as outlined herein.

VII. CONCLUSION

The United States Supreme Court has, through a series of recent decisions culminating in *Miller*, indicated that juveniles are subject to different treatment than adults for purposes of sentencing under the Eighth Amendment. Specifically, we hold that in Michigan a sentencing court must consider, at the time of sentencing, characteristics associated with youth as identified in *Miller* when determining whether to sentence a juvenile convicted of a homicide offense to life in prison with or without the eligibility for parole. While *Miller* does not serve to "foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[192]

While *Miller* is applicable to those cases currently pending or on direct review, we find that in accordance with *Teague* and Michigan law that it (1) is not to be applied retroactively to cases on collateral review, such as Carp's, because the decision is procedural and not substantive in nature, and (2) does not comprise a watershed ruling. We urge our Legislature to address with all possible expediency the issues encompassed by and resulting from *Miller* that necessitate the revision of our current statutory sentencing scheme for juveniles.

In the interim, as guidance for our trial courts for those cases currently in process or on remand following

[192] *Miller*, 567 US at ___; 132 S Ct at 2469.

direct appellate review, we find that MCL 791.234(6)(a) is unconstitutional as currently written and applied to juvenile homicide offenders. When sentencing a juvenile, defined now as an individual below 18 years of age for a homicide offense, the sentencing court must, at the time of sentencing, evaluate and review those characteristics of youth and the circumstances of the offense as delineated in *Miller* and this opinion in determining whether following the imposition of a life sentence the juvenile is to be deemed eligible or not eligible for parole. We further hold that the Parole Board must respect the sentencing court's decision by also providing a meaningful determination and review when parole eligibility arises.

Affirmed.

FITZGERALD and WHITBECK, JJ., concurred with TALBOT, P.J.

PEOPLE v FRANKLIN

Docket No. 296591. Submitted June 12, 2012, at Lansing. Decided November 15, 2012, at 9:10 a.m.

John S. Franklin pleaded no contest in the Saginaw Circuit Court to charges of aggravated indecent exposure, MCL 750.335a(1) and (2)(b), and indecent exposure, MCL 750.335a(1) and (2)(a). The court, Fred L. Borchard, J., sentenced defendant as a fourth-offense habitual offender to 34 months to 15 years in prison for the aggravated indecent exposure conviction and, as a sexually delinquent person under MCL 750.335a(2)(c), to one day to life in prison for the indecent exposure conviction. Defendant filed a delayed application for leave to appeal, which the Court of Appeals denied in an unpublished order entered on March 24, 2010. Defendant sought leave to appeal in the Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 490 Mich 871 (2011).

The Court of Appeals *held*:

1. Under MCL 750.335a(2)(c), a person convicted of indecent exposure is subject to an indeterminate sentence of one day to a maximum of life in prison if he or she was a sexually delinquent person at the time of the offense. MCL 750.10a defines a sexually delinquent person as any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sex relations of either a heterosexual or homosexual nature, or by the commission of sexual aggressions against children under the age of 16. MCL 767.61a states that when a defendant pleads guilty to charges of both indecent exposure and being a sexually delinquent person, the court must conduct an examination of witnesses relative to the sexual delinquency of the person. This examination may take place at the plea hearing or later. Entering a plea of no contest is tantamount to an admission of guilt. In this case, defendant pleaded no contest to a two-count felony information charging him with aggravated indecent exposure and indecent exposure under circumstances subjecting him to alternative

sentencing as a sexually delinquent person, but the trial court erred by failing to hold a hearing regarding defendant's status as a sexually delinquent person.

2. The United States and Michigan Constitutions both protect an individual from being placed twice in jeopardy for the same offense. The protections afforded by the double jeopardy bar include the prevention of multiple punishments for the same conduct. Whether a defendant has received multiple punishments for the same conduct is generally determined under the same-elements test, which requires the reviewing court to determine whether each statute requires proof of a fact that the other does not. Yet, there is no double jeopardy violation if the legislative intent clearly authorizes cumulative or multiple punishments. When one statute incorporates most of the elements of a base statute and adds an aggravating conduct element with an increased penalty compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes. The offense of indecent exposure does not contain any elements that are distinct from the offense of aggravated indecent exposure. Because the Legislature has not expressed a clear intent to permit multiple punishments for the same conduct under the indecent exposure statute, defendant could not be convicted of both offenses. The appropriate remedy was to vacate the lower charge and affirm the higher conviction.

Conviction of indecent exposure and sentencing enhancement arising from the finding that defendant was a sexually delinquent person vacated; conviction of aggravated indecent exposure affirmed.

1. CRIMINAL LAW — INDECENT EXPOSURE — SEXUALLY DELINQUENT PERSON — HEARING REQUIRED.

Under MCL 750.335a(2)(c), a person convicted of indecent exposure is subject to an indeterminate sentence of one day to a maximum of life in prison if the defendant was a sexually delinquent person at the time of the offense; MCL 750.10a defines a sexually delinquent person as any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sex relations of either a heterosexual or homosexual nature, or by the commission of sexual aggressions against children under the age of 16; MCL 767.61a states that when a defendant pleads guilty to charges of both indecent exposure and being a sexually delinquent person, the court must conduct an examination of witnesses relative to the sexual delinquency of the person; this examination may take place at the plea hearing or later.

2. CONSTITUTIONAL LAW — CRIMINAL LAW — DOUBLE JEOPARDY — MULTIPLE PUNISHMENTS — INDECENT EXPOSURE — AGGRAVATED INDECENT EXPOSURE.

The United States and Michigan Constitutions both protect an individual from being placed twice in jeopardy for the same offense; the protections afforded by the double jeopardy bar include the prevention of multiple punishments for the same conduct; whether a defendant has received multiple punishments for the same conduct is generally determined under the same-elements test, which requires the reviewing court to determine whether each statute requires proof of a fact that the other does not; there is, however, no double jeopardy violation if the legislative intent clearly authorizes cumulative or multiple punishments; when one statute incorporates most of the elements of a base statute and adds an aggravating conduct element with an increased penalty compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes; the offense of indecent exposure does not contain any elements that are distinct from the offense of aggravated indecent exposure and a defendant may not be convicted of both offenses for the same conduct (US Const, Am V; Const 1963, art 1, § 15; MCL 750.335a).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Michael D. Thomas*, Prosecuting Attorney, and *Randy L. Price*, Assistant Prosecuting Attorney, for the people.

Daniel D. Bremer for defendant.

Before: BECKERING, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM. In lieu of granting leave to appeal, the Michigan Supreme Court remanded this case to this Court "for consideration as on leave granted." *People v Franklin*, 490 Mich 871 (2011).[1] Defendant entered a

[1] Defendant had filed a delayed application for leave to appeal, which this Court had denied on March 24, 2010. *People v Franklin*, unpublished order of the Court of Appeals, entered March 24, 2010 (Docket No. 296591).

plea of *nolo contendere* to charges of aggravated indecent exposure, MCL 750.335a(1) and (2)(b), and indecent exposure, MCL 750.335a(1) and (2)(a). The trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to 34 months to 15 years in prison for the aggravated indecent exposure and, as a sexually delinquent person under MCL 750.335a(2)(c), to one day to life in prison for the indecent exposure. We vacate defendant's indecent exposure conviction and the finding of sexual delinquency and affirm defendant's aggravated indecent exposure conviction.

First we find that the trial court erred by sentencing defendant as a sexually delinquent person without first holding a hearing to determine if defendant was sexually delinquent. A trial court's general conduct of trial is reviewed for an abuse of discretion. See *People v Romano*, 181 Mich App 204, 220; 448 NW2d 795 (1989); *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). To the extent that resolution of this issue involves a matter of statutory interpretation, review is de novo. *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009). The trial court's findings of fact are reviewed for clear error. *Id.*

MCL 750.335a(2)(c) provides that a person convicted of indecent exposure is subject to an indeterminate sentence of one day to a maximum of life if the defendant was a "sexually delinquent person" at the time of the offense. MCL 750.10a defines "sexually delinquent person" as

> any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sex relations of either a heterosexual or homosexual nature, or by the commission of sexual aggressions against children under the age of 16.

MCL 767.61a provides, in pertinent part, that when the possibility of adjudicating a defendant as a sexually delinquent person is in issue,

> the indictment shall charge the offense and may also charge that the defendant was, at the time said offense was committed, a sexually delinquent person. In every such prosecution the people may produce expert testimony and the court shall provide expert testimony for any indigent accused at his request. *In the event the accused shall plead guilty to both charges in such indictment*, *the court* in addition to the investigation provided for in [MCL 768.35][2], and *before sentencing the accused, shall conduct an examination of witnesses relative to the sexual delinquency of such person* and may call on psychiatric and expert testimony. All testimony taken at such examination shall be taken in open court and a typewritten transcript or copy thereof, certified by the court reporter taking the same, shall be placed in the file of the case in the office of the county clerk. Upon a verdict of guilty to the first charge or to both charges or upon a plea of guilty to the first charge or to both charges the court may impose any punishment provided by law for such offense. [Emphasis added.]

In *People v Helzer*, 404 Mich 410, 419; 273 NW2d 44 (1978), overruled on other grounds by *People v Breidenbach*, 489 Mich 1, 3-4 (2011), our Supreme Court concluded that under MCL 767.61a, "[e]ven where

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[2] MCL 768.35 provides as follows:

> Whenever any person shall plead guilty to an information filed against him in any court, it shall be the duty of the judge of such court, before pronouncing judgment or sentence upon such plea, to become satisfied after such investigation as he may deem necessary for that purpose respecting the nature of the case, and the circumstances of such plea, that said plea was made freely, with full knowledge of the nature of the accusation, and without undue influence. And whenever said judge shall have reason to doubt the truth of such plea of guilty, it shall be his duty to vacate the same, direct a plea of not guilty to be entered and order a trial of the issue thus formed.

defendant pleads guilty, the court is ordered to separately investigate the charge of sexual delinquency." *Helzer* further directed that if a defendant pleads to both the principal and delinquency charges, the court's consideration of the latter "should be conducted under a procedure equivalent to that used where a jury decides the sexual delinquency question." *Id.* at 419 n 15. *Breidenbach*, 489 Mich at 18, overruled *Helzer* to the extent that it had held that pursuant to MCL 767.61a, separate juries are required to determine a defendant's guilt of the underlying charge and the charge of being a sexually delinquent person. Our Supreme Court in *Breidenbach* observed that "MCL 767.61a *only* calls for a separate hearing in regards to sexual delinquency '[i]n the event the accused shall plead guilty . . . .' " *Breidenbach*, 489 Mich at 10 (citation omitted).

Entering a plea of *nolo contendere* is "an admission of all the essential elements of a charged offense and, thus, is tantamount to an admission of guilt for the purposes of the criminal case." *People v Patmore*, 264 Mich App 139, 149; 693 NW2d 385 (2004). In this case, defendant answered affirmatively to the court's question concerning whether he was "entering a no contest plea." The two-count felony information charged defendant with one count of aggravated indecent exposure and one count of indecent exposure under circumstances subjecting him to alternative sentencing as a sexually delinquent person. Given those facts, defendant's plea should be understood as an admission of guilt with regard to the indecent exposure charges and the sexually delinquent person charge. The question then becomes whether the process followed by the court before sentencing constituted "a separate hearing in regards to sexual delinquency . . . . " *Breidenbach*, 489 Mich at 10. We conclude that it did not.

The Legislature specifically required that the court conduct an examination regarding sexual delinquency. This examination could have taken place at the plea hearing or later. The prosecution admitted in its brief before this Court that no hearing was conducted. However, the prosecution contends that an examination of criminal history is sufficient to meet the requirement imposed by the Legislature as interpreted by the Court in *Breidenbach*. This defendant's history is disconcerting and replete with convictions for indecent exposure and other sexual misconduct offenses from 1980 until 1998. However, the prosecution's argument would render the sexual-delinquency enhancement automatic for every habitual sexual offender. Certainly the Legislature could have exercised its policymaking authority and provided for automatic enhancement of some sort. It did not. Rather, it required a separate examination, interpreted by the Court to be a hearing. No such hearing occurred in this case. However, as discussed later in this opinion, because of our determination that the underlying conviction for indecent exposure violates the prohibition against double jeopardy and must be vacated, we need not remand for further proceedings. Given that the amended information and the judgment of sentence tied the sexually delinquent person enhancement to the indecent exposure charge and not to the aggravated indecent exposure charge, see MCL 767.61a, there is no conviction to which the sentencing enhancement may now be applied.

Next we address the issue of defendant's convictions of both aggravated indecent exposure and indecent exposure and find that they violate his double jeopardy rights. A claim that a conviction violates the prohibition against double jeopardy presents a question of law that this Court reviews de novo. *People v Artman*, 218 Mich App 236, 244; 553 NW2d 673 (1996).

Both the United States and Michigan Constitutions protect an individual "from being placed twice in jeopardy for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004); US Const, Am V; Const 1963, art 1, § 15. A plea of *nolo contendere* does not waive a defendant's right to claim a double jeopardy violation on appeal. *Artman*, 218 Mich App at 244. The double jeopardy bar prevents (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Nutt*, 469 Mich at 574. In the present case, defendant asserts that he received multiple punishments for the same offense.

Whether a defendant has received multiple punishments for the same offense is "generally determined under the same-elements test, which requires the reviewing court to determine whether each provision requires proof of a fact which the other does not." *People v Strickland*, 293 Mich App 393, 401; 810 NW2d 660 (2011) (quotation marks and citations omitted). Yet there is no double jeopardy violation if the legislative intent clearly authorizes cumulative or multiple punishments. *People v Ford*, 262 Mich App 443, 449; 687 NW2d 119 (2004). The appropriate remedy for multiple punishments in violation of the prohibition against double jeopardy is to vacate the lower charge and affirm the higher conviction. *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001).

MCL 750.335a indicates that an individual is guilty of indecent exposure if the person "knowingly make[s] any open or indecent exposure of his or her person or of the person of another," whereas aggravated indecent exposure requires additional proof that the person "was fondling his or her genitals, pubic area, [or] buttocks . . . . " MCL 750.335a(2)(b). In this case, defen-

dant was convicted of both aggravated indecent exposure and indecent exposure.

Aggravated indecent exposure and indecent exposure are the "same offense" for purposes of double jeopardy. Our conclusion arises from the manner in which 750.335a is written. "[W]here one statute incorporates most of the elements of a base statute and adds an aggravating conduct element with an increased penalty compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes." *People v McKinley*, 168 Mich App 496, 504; 425 NW2d 460 (1988). The offense of indecent exposure does not contain any elements that are distinct from the offense of aggravated indecent exposure. Therefore, because the Legislature has not expressed a clear intent to permit multiple punishments for the same conduct, this defendant cannot be convicted of both offenses. To the extent that the prosecution argues that defendant's convictions do not violate double jeopardy because the indecent exposure conviction required a showing of sexual delinquency, we note that sexual delinquency is not an actual element of that offense. Rather, a finding of sexual delinquency merely allows for an enhancement of the sentence for the indecent exposure offense. If sexual delinquency were an element of the offense, a separate hearing to determine sexual delinquency would not be required in light of a plea of guilty or *nolo contendere*.

We vacate defendant's conviction for indecent exposure and the sentencing enhancement arising from the finding that defendant was a sexually delinquent person and affirm the conviction for aggravated indecent exposure.

BECKERING, P.J., and FITZGERALD and STEPHENS, JJ., concurred.

HUNT v DRIELICK

HUBER v DRIELICK

LUCZAK v DRIELICK

Docket Nos. 299405, 299406, and 299407. Submitted October 3, 2012, at Lansing. Decided November 20, 2012, at 9:00 a.m. Leave to appeal sought.

Marie Hunt, personal representative of the estate of Eugene Hunt; Brandon Huber; and Thomas and Noreen Luczak brought separate actions in the Bay Circuit Court against Roger Drielick, doing business as Roger Drielick Trucking; Corey Drielick; Great Lakes Carriers Corporation; Sargent Trucking, Inc.; and others, following a multivehicle accident in which Corey was driving a Drielick Trucking semitractor without a trailer. Corey had been en route to Great Lakes to pick up a loaded trailer at the time of the accident. The court, William J. Caprathe, J., consolidated the actions. Empire Fire and Marine Insurance Company had issued a "non-trucking use" insurance policy to Drielick Trucking. Empire, citing the policy's named-driver and business-use exclusions, denied coverage and refused to defend the suit. Plaintiffs settled with Great Lakes and Sargent, entering into agreements to dismiss the suits against Great Lakes and Sargent in exchange for monetary compensation. Plaintiffs also entered into consent judgments with the Drielicks. In turn, the Drielicks assigned any rights they had to collect on their insurance claims to plaintiffs, Great Lakes, and Sargent, while Great Lakes and Sargent agreed to pursue satisfaction and reimbursement of the consent judgments. Plaintiffs agreed to share in the insurance proceeds with Great Lakes and Sargent in exchange for their collection efforts. The attorney for Great Lakes filed writs of garnishment against Empire for the amounts of the consent judgments. Empire moved to quash the writs. The court denied the motion, ruling that Empire had improperly denied coverage under the policy. The court issued three judgments against Empire in order to execute the consent judgments. Empire appealed. The Court of Appeals, HOEKSTRA, P.J., and COOPER and K. F. KELLY, JJ., affirmed in part, reversed in part, and remanded in an unpublished opinion per curiam, issued October 5, 2004 (Docket Nos. 246366, 246367, and 246368), concluding that Empire could not rely on the named-driver exclusion because the

policy did not meet the statutory requirements for excluding a named driver from coverage, but that Empire was entitled to defend against the garnishment on the basis of the business-use exclusion and that the trial court needed to take further evidence to determine whether the accident was a covered event. On remand, the trial court held that the business-use exclusion was not applicable and rejected Empire's objections to the garnishment. Empire appealed.

The Court of Appeals *held*:

Insurance contracts must be interpreted according to the terms in the contract and when the terms are clear, they must be enforced as written. In this case, the contract contained a business-use exclusion stating that Empire was not liable for bodily injury or property damage while a covered automobile was used to carry property in any business. The exclusionary language did not state that the automobile had to be carrying property at the time of the accident. The accident at issue occurred during an interval of time when the semitractor was employed for the purpose of carrying property in the trucking business given that it was being driven to a location where it was to pick up a loaded trailer to be transported. Therefore, the business-use exclusion applied and Empire was relieved from any obligation to provide coverage under the contract.

Reversed; writs of garnishment quashed.

INSURANCE — CONTRACTS — CONSTRUCTION OF CONTRACTS — EXCLUSIONS FROM COVERAGE — BUSINESS-USE.

Insurance contracts must be interpreted according to the terms in the contract and when the terms are clear, they must be enforced as written; an insurance contract containing a business-use exclusion stating that the insurer is not liable for bodily injury or property damage while a covered automobile is used to carry property in any business, does not apply only when the covered automobile is carrying property at the time of an accident; rather, the exclusion applies when an accident occurs during an interval of time when the automobile is employed for the purpose of carrying property in a business.

David Carbajal and *Bruce F. Trogan* for Marie Hunt.

David Carbajal and *Joseph S. Harrison* for Brandon J. Huber.

David Carbajal and *Peter J. Riebschleger* for Thomas Luczak and Noreen Luczak.

Hickey, Cianciolo, Fishman & Finn, P.C. (by *Steven M. Hickey*), for Sargent Trucking, Inc.

Ward, Anderson, Porritt & Bryant, PLC (by *David S. Anderson* and *Nicolette S. Zachary*) for Empire Fire and Marine Insurance Company.

Before: RONANYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

RIORDAN, J. In a consolidated appeal in docket nos. 299405, 299406, and 299407, garnishee-defendant, Empire Fire and Marine Insurance Company appeals as of right a trial court order rejecting its objections to the garnishment sought by Great Lakes Carriers Corporation and Sargent Trucking, Inc. The garnishments were made payable to plaintiffs Marie Hunt, Thomas and Noreen Luczak, and James Huber, all of whom were involved in a car accident with truck driver Corey Drielick (Corey). We reverse the decision of the trial court and quash the writs of garnishment.[1]

[1] In their appellate brief, plaintiffs claim that this Court has already determined that this appeal cannot be an appeal as of right. Plaintiffs cite *Hunt v Drielick*, unpublished order of the Court of Appeals, entered September 3, 2010 (Docket No. 299389), involving a trial court order dated July 12, 2010, which vacated previous trial court orders nunc pro tunc. The order appealed here, however, is a different order entered on July 12, 2010, which overruled Empire's objections to the garnishment judgments. Thus, plaintiffs' argument is factually inaccurate because this Court has not ruled that the order at issue here is not a final order. Moreover, when dismissing Empire's delayed applications for leave to appeal, this Court specifically stated that Empire's claims could be raised as of right in the appeals at issue here. *Hunt v Drielick*, unpublished order of the Court of Appeals, entered January 21, 2011 (Docket No. 299290); *Huber v Drielick*, unpublished order of the Court of Appeals,

I. BACKGROUND FACTS

A. PREVIOUS APPEAL

Corey was driving a 1985 freightliner semitractor without a trailer when he was in a car accident with plaintiffs. After the accident, plaintiffs filed separate lawsuits, later consolidated, against numerous parties including Corey and his brother, Roger Drielick, as well as Sargent and Empire. In a previous appeal in the case, this Court summarized the factual developments and procedural history as follows:

> Defendant Roger Drielick contacted the insurance carrier for his trucking company, Empire, regarding the lawsuits. Empire had issued a non-trucking use, or bobtail, policy to Drielick Trucking. The policy covered damages and liability when the semi truck was not engaged in the business of hauling a trailer or under lease to a carrier. Empire denied coverage and refused to defend, based on the policy's business use exclusion, claiming that the truck was under lease to or being used in the business of Great Lakes at the time of the accident, and under the named driver exclusion. The policy excluded Corey as a covered driver.
>
> Following settlement negotiations, all plaintiffs settled with Great Lakes and Sargent and entered into a covenant to dismiss the suit against Great Lakes and Sargent and/or their insurance carriers. The settlement agreements did not release the Drielicks and expressly indicated that all plaintiffs and defendants were free to proceed against Empire. As a result of the settlement negotiations, plaintiffs also entered into consent judgments with the Drielicks. Thereafter, the parties agreed to an "Assignment, Trust and Indemnification Agreement." The Drielicks, to

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entered January 21, 2011 (Docket No. 299286); *Luczak v Drielick*, unpublished order of the Court of Appeals, entered January 21, 2011 (Docket No. 299292). Thus, plaintiffs' challenge to this Court's jurisdiction is meritless.

> avoid the collection and execution of the consent judgments against them, assigned their right to collect on their insurance claims to plaintiffs, as well as Great Lakes and Sargent. In turn, Great Lakes and Sargent agreed to attempt to collect the consent judgments and to intervene in any collection action filed by plaintiffs.
>
> As a result of this agreement and the assignments therein, the attorney for Great Lakes filed writs of garnishment, with plaintiffs' consent, against Empire for the amounts of the consent judgments. Plaintiffs agreed to share in the proceeds with Great Lakes and Sargent in exchange for their collection efforts. Empire filed a motion to quash the writs, arguing that Great Lakes and Sargent lacked standing to seek the writs and that it properly denied coverage, based on the policy exclusions. The trial court denied the motion, finding that Empire improperly denied coverage under its policy. The court specifically found that Empire's named driver exclusion did not comport with MCL 500.3009(2), and that its business use exclusion was ambiguous. The trial court then issued three judgments against Empire, and in favor of plaintiffs, in order to execute the consent judgments. [*Hunt v Drielick*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 2004 (Docket Nos. 246366, 246367, and 246368), pp 3-4.]

Empire appealed the trial court's garnishment ruling in this Court, claiming that the named-driver exclusion and the business-use exclusion justified the denial of coverage. *Id.* at 4-6. Empire's policy is titled "Insurance for Non-Trucking Use," and the business-use exclusion states that Empire is not liable for "[b]odily injury or property damage while a covered auto is used to carry property in any business or while a covered auto is used in the business of anyone to whom the auto is leased or rented." (Quotation marks omitted.) While this Court held that the named-driver exclusion was invalid, we also held that the business-use exclusion was unambiguous and further factual development was needed to

allow the trial court to determine if the business-use exclusion applies and, if so, whether a writ of garnishment was properly entered against Empire. *Hunt*, unpub op at 5-6.

B. BUSINESS-USE EXCLUSION

Thus, the only remaining issue in the lawsuit is whether the business-use exclusion applies and precludes coverage. At the time of the accident, Corey was driving to the Great Lakes Carriers yard in Linwood because William Bateson, who worked for Great Lakes Carriers, had dispatched Corey to haul a load to Cheboygan. Corey was only miles from the yard at the time of the accident and was not transporting any property.[2]

After a hearing regarding the business-use exclusion, the trial court issued an opinion and order holding that neither prong of the policy's business-use exclusion was applicable. The trial court noted that Corey had yet to pick up the trailer at the time of the accident, Corey was not under orders to be at Great Lakes Carriers's yard at a particular time, Corey was free to complete personal business before arriving at the yard, and there was an oral agreement that Corey would not be paid until the cab was coupled with the trailer. The trial court also concluded that the lack of a written lease and the lack of a state identification card from Great Lakes Carriers suggested that the truck was not being used in the business of anyone who had leased the truck. The trial court held that Empire's policy was in full force at the time of the accident and rejected Empire's objections to the garnishment. Empire now appeals.

[2] For the reasons stated later in this opinion, this Court need not consider the second clause of the business-use exclusion regarding whether there was a lease agreement.

II. STANDARD OF REVIEW

"Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are . . . reviewed de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

III. ANALYSIS

Empire contends that the first part of the business-use exclusion applies and precludes coverage and garnishment by Great Lakes Carriers and Sargent.[3] We agree. "[I]nsurance polices are subject to the same contract construction principles that apply to any other species of contract." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 714; 706 NW2d 426 (2005) (emphasis, quotation marks, and citation omitted) (alteration in original). Thus, insurance contracts must be interpreted according to the terms in the contract and when the terms are clear, they must be enforced as written. *Westfield Ins Co v Ken's Serv*, 295 Mich App 610, 615; 815 NW2d 786 (2012); *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 24; 800 NW2d 93 (2010). Moreover, "[e]xclusionary clauses in insurance policies are strictly construed in favor of the insured," although "[c]lear and specific exclusions must be given effect because an insurance company

[3] Empire makes a passing assertion that the motion for reconsideration was improperly denied. However, Empire failed to include this issue the section of its brief setting forth the questions involved. Therefore, this issue is "not preserved for appeal" and we need not consider it. *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003); see also MCR 7.212(C)(5) (stating that an appellant's brief must include "[a] statement of questions involved, stating concisely and without repetition the questions involved in the appeal" and "[e]ach question must be expressed and numbered separately"). But even considering Empire's passing assertion that the motion for reconsideration was improperly denied, we find the issue to be meritless.

cannot be liable for a risk it did not assume." *Hayley v Allstate Ins Co*, 262 Mich App 571, 574; 686 NW2d 273 (2004) (quotation marks and citation omitted). If the terms of an insurance policy are not "clearly defined within the policy" they are "given their commonly used meaning." *Group Ins Co of Mich v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992).

The first part of the business-use exclusion states that coverage does not apply when bodily injury or property damage occur "while a covered auto is used to carry property in any business . . . ." (Quotation marks omitted.) Given that there is no Michigan law directly on point, Empire cites numerous federal cases that involve the exact same exclusionary language concerning an automobile being "used to carry property in any business." One such case is *Carriers Ins Co v Griffie*, 357 F Supp 441, 442 (WD Pa, 1973), which involved a vehicle driven by the owner but leased to a carrier. The carrier dispatched the driver to pick up a load, and, consistently with the carrier's policy, the driver first drove to a garage to have the truck inspected. *Id*. At the garage, the driver drove over the victim's foot, which resulted in the subsequent litigation regarding an exclusion in the insurance policy that stated coverage did not apply "while the automobile . . . is used to carry property in any business[.]" *Id.*

When interpreting this phrase, the court stated that "[t]he mere fact that no cargo was being handled at the particular moment when the accident occurred does not mean that the [truck] was not 'used to carry property in any business.' " *Id.* The court stated that the truck "was regularly so used to carry property in the carrier's business as a trucker" and "[i]f the intent had been to extend coverage except when the [truck] was actually hauling a load, it would not have been difficult to

express such an intention clearly." *Id.* The court ultimately held that the insurance company was not liable under the policy. *Id.* at 443.

Likewise in this case, the parties agree that Corey was under dispatch at the time of the accident and was only a couple of miles away from the yard. Even though Corey did not have to be at the yard at a specific time, he was not driving aimlessly, and there is no dispute that he was specifically driving to the yard to attach the loaded trailer and drive to Cheboygan. While Corey was not carrying property at the time of the accident, the exclusion does not state that the auto must be carrying property. Rather, the exclusion applies "while the covered auto is used to carry property in any business . . . ." (Quotation marks omitted.) The term "while" is defined as "an interval of time," and the term "use" is defined as "to employ for some purpose; put into service[.]" *Random House Webster's* College Dictionary (2001).[4] Further, the policy at issue in this case is titled "Insurance for Non-Trucking Use." Because Corey was purposely driving to the yard to transport property, the accident occurred during an interval of time when the truck was employed for the purpose of carrying property in the trucking business. This is not a case in which the driver was engaged in an activity unrelated to the business of transporting property, such as driving a truck on a personal matter, to which the exclusion would not apply.[5]

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[4] As previously noted, if the terms of an insurance policy are not "clearly defined within the policy" they are "given their commonly used meaning." *Group Ins Co of Mich*, 440 Mich at 596.

[5] In *Connecticut Indemnity Co v Stringfellow*, 956 F Supp 553, 558 (MD Pa, 1997), a federal district court interpreted a phrase similar to the exclusion in this case to mean that the automobile must actually be carrying property in order for the exclusion to apply. However, in *Stringfellow*, the driver was not under any order to pick up or drop off

We must apply the plain language of the contract as written. See *Westfield Ins Co*, 295 Mich App at 615. If the parties had intended to draft an exclusion limiting coverage to only those occasions when cargo was actually, physically, on the truck, they were free to do so. But they did not. Instead, the language of the exclusion is "*while* a covered auto *is used to carry property* in any business," not "while a covered auto is *carrying* property in any business." (Quotation marks omitted; emphasis added.) To disregard the word "while" or the phrase "is used" would violate this Court's mandate to give effect to every word, phrase, and clause in order to avoid rendering terms surplusage or nugatory. See *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

IV. CONCLUSION

Given that the first clause of the business-use exclusion applies, we need not address whether the second clause, relating to a lease or rental agreement, applies. Moreover, because the business-use exclusion applies, Empire was relieved from any obligation to provide coverage under the contract, and the trial court erred by concluding otherwise. We reverse the decision of the trial court and quash the writs of garnishment. We do not retain jurisdiction.

RONAYNE KRAUSE, P.J., and BORRELLO, J., concurred with RIORDAN, J.

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property, nor was he engaged in any sort of inspection as was the driver in *Griffie*. The driver in *Stringfellow*, instead, was having his truck washed and was shopping for a Christmas present. *Id*. at 555-556.

ACORN INVESTMENT CO v MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION

Docket No. 306361. Submitted November 15, 2012, at Detroit. Decided November 27, 2012, at 9:00 a.m. Leave to appeal sought.

Acorn Investment Co. brought an action in the Wayne Circuit Court against the Michigan Basic Property Insurance Association, seeking to recover under a fire-insurance policy issued by defendant for losses suffered when a fire occurred on plaintiff's property. Defendant had denied coverage on the basis that the policy had been canceled before the fire occurred. The court, Daphne Means Curtis, J., granted summary disposition in plaintiff's favor, ruling that the notice of cancellation was insufficient to effectively cancel the policy. The case proceeded to case evaluation, which resulted in an award in plaintiff's favor of $11,000. Plaintiff accepted the award and defendant rejected it. The parties then agreed to submit the matter to an appraisal panel as set forth in the insurance policy to determine the value of plaintiff's loss. The appraisal panel determined that $20,877 was the actual cash value of plaintiff's loss. Plaintiff then filed a motion for entry of judgment and also sought case-evaluation sanctions and debris-removal expenses. The court entered a judgment in plaintiff's favor for $20,877 plus interest but declined to award case-evaluation sanctions or debris-removal expenses. Plaintiff appealed.

The Court of Appeals *held*:

1. The appraisal process utilized in this case was a substitute for the judicial determination of the dispute over the amount of loss to be paid by defendant and was effectively an arbitration. An order or judgment entered pursuant to an arbitration or settlement is not a "verdict" within the meaning of MCR 2.403(O)(2)(c), which defines a "verdict" for purposes of determining the rejecting party's liability for costs as, in part, a judgment entered as a result of a ruling on a motion after rejection of the case evaluation. The trial court's order granting plaintiff's motion for entry of judgment merely confirmed the appraisal award and did not constitute a verdict under MCR 2.403(O)(2)(c). The trial court properly denied plaintiff's request for case-evaluation sanctions.

2. The case proceeded through the case-evaluation process without plaintiff raising the issue of debris-removal expenses.

Defendant did not assert that debris-removal expenses were not covered under the policy. The appraisal panel would have addressed debris-removal expenses if plaintiff had submitted evidence showing that it had incurred such expenses. Plaintiff waived its claim for such expenses by submitting the case for appraisal and proceeding through the process without raising the issue. The trial court did not err by denying plaintiff's request for debris-removal expenses.

Affirmed.

1. COSTS — MEDIATION SANCTIONS — JUDGMENTS — ORDERS — ARBITRATION — SETTLEMENTS — WORDS AND PHRASES — VERDICT.

A judgment or order that is entered pursuant to an arbitration or settlement is not a "verdict" within the meaning of MCR 2.403(O)(2)(c), which defines a verdict for purposes of determining the liability for costs of a party that rejected a case-evaluation award as, in part, a judgment entered as a result of a ruling on a motion after rejection of the case evaluation award; a trial court's order granting a party's motion for entry of judgment that merely confirms an appraisal award is not a verdict under the court rule.

2. INSURANCE — ACTIONS — COVERAGE ISSUES — APPRAISALS OF DAMAGES — WAIVER.

A court should determine coverage issues in a declaratory judgment action before an appraisal process is employed to determine the damage to an insured's property when an insurer and its insured cannot agree on coverage under an insurance policy; issues involving an insurance policy's coverage are generally for the court to determine; an appraisal process cannot legally settle coverage issues; an insured waives its coverage-based challenge and is bound by an appraisal award, absent bad faith, fraud, misconduct, or manifest mistake, when the parties stipulated to submit the insured's insurance claim for a loss for an appraisal without first seeking to have the trial court determine the coverage challenge.

James C. Klemanski for plaintiff.

Patrick, Johnson & Mott, P.C. (by *John D. Honeyman*), for defendant.

Before: FORT HOOD, P. J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM. Plaintiff appeals as of right the trial court's orders denying its motion for case-evaluation sanctions and the assessment of debris-removal expenses. Because plaintiff did not obtain a "verdict" entitling it to case-evaluation sanctions under MCR 2.403(O)(2)(c) and it waived its claim for debris-removal expenses, we affirm.

This case arises out of a fire that occurred on plaintiff's property in Detroit on May 27, 2007. Plaintiff filed a claim with defendant, its fire-insurance carrier, which defendant denied on the basis that the policy had been canceled effective May 16, 2007. Plaintiff then filed this action against defendant, and the trial court granted summary disposition in plaintiff's favor, ruling that defendant's notice of cancellation was insufficient to effectively cancel the policy. The case proceeded to case evaluation, which resulted in an award of $11,000 in plaintiff's favor. Plaintiff accepted the award and defendant rejected it. Thereafter, the parties agreed to submit this case to an appraisal panel to determine the value of plaintiff's loss. The appraisal panel issued an appraisal award determining that $20,877 was the actual cash value of plaintiff's loss. Plaintiff then filed a motion for entry of judgment, which also sought case-evaluation sanctions and debris-removal expenses. The trial court entered a judgment in plaintiff's favor in the amount of the appraisal award plus interest but declined to award case-evaluation sanctions or assess debris-removal expenses.

Plaintiff first argues that the trial court erroneously denied its request for case-evaluation sanctions because it obtained a "verdict" within the meaning of MCR 2.403(O)(2)(c), which entitled it to actual costs. A trial court's decision whether to impose case-evaluation sanctions is a question of law subject to review de novo on appeal. *Cusumano v Velger*, 264 Mich App 234, 235; 690

NW2d 309 (2004). Likewise, the interpretation of a court rule is a question of law that we review de novo on appeal. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 28; 666 NW2d 310 (2003).

The underlying purpose of case evaluation is " 'to encourage settlement and deter protracted litigation by placing the burden of litigation costs' " on the party that rejected the case evaluation and required the case to proceed to trial. *Id*. at 32, quoting *Broadway Coney Island, Inc v Commercial Union Ins Cos (Amended Opinion)*, 217 Mich App 109, 114; 550 NW2d 838 (1996). MCR 2.403(O) provides, in relevant part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. . . .
>
> (2) For the purpose of this rule "verdict" includes,
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> (a) a jury verdict,
>
> (b) a judgment by the court after a nonjury trial,
>
> (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

"In applying MCR 2.403(O)(2), this Court has consistently rejected attempts to expand or read additional meaning into the rule that is not expressly stated." *Jerico Constr, Inc*, 257 Mich App at 30. This Court has expressly warned against "impermissibly expand[ing], by judicial fiat, the specific and precisely worded definition of 'verdict' to include any order ending any part of a case by whatever method, thereby rendering the limiting language of MCR 2.403(O)(2)(a)-(c) nugatory." *Id*. at 31-32.

This Court has recognized that the appraisal process mandated by statute[1] and utilized in the instant case "is

[1] MCL 500.2833(1)(m) requires that every fire-insurance policy issued or delivered in Michigan contain the following provision:

a substitute for the judicial determination of disputes over the amount of losses to be paid by insurers." *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 399; 605 NW2d 685 (1999). It is " 'a simple and inexpensive method for the prompt adjustment and settlement of claims' " and effectively constitutes arbitration. *Auto-Owners Ins Co v Kwaiser*, 190 Mich App 482, 486; 476 NW2d 467 (1991), quoting *Thermo-Plastics R & D, Inc v Gen Accident Fire & Life Assurance Corp, Ltd*, 42 Mich App 418, 422; 202 NW2d 703 (1972). This Court has previously rejected the notion that an order or judgment entered following arbitration or settlement constitutes a "verdict" within the meaning of MCR 2.403(O). In *Saint George Greek Orthodox Church of Southgate, Mich v Laupmanis Assoc, PC*, 204 Mich App 278, 282-284; 514 NW2d 516 (1994), this Court held that mediation sanctions were not awardable under a previous version of MCR 2.403 when the claim was resolved through arbitration and the court merely entered an order confirming the

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That if the insured and insurer fail to agree on the actual cash value or amount of the loss, either party may make a written demand that the amount of the loss or the actual cash value be set by appraisal. If either makes a written demand for appraisal, each party shall select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days after receipt of the written demand. The 2 appraisers shall then select a competent, impartial umpire. If the 2 appraisers are unable to agree upon an umpire within 15 days, the insured or insurer may ask a judge of the circuit court for the county in which the loss occurred or in which the property is located to select an umpire. The appraisers shall then set the amount of the loss and actual cash value as to each item. If the appraisers submit a written report of an agreement to the insurer, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any 2 of these 3 shall set the amount of the loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by the insured and the insurer.

arbitration award.[2] In *Smith v Elenges*, 156 Mich App 260, 263-264; 401 NW2d 342 (1986), this Court held that a consent judgment was not a "verdict" as that term was used in Wayne Circuit Court Rule 403.15(c) , an early predecessor of MCR 2.403(O). See also *Jerico Constr, Inc*, 257 Mich App at 30-31. Similarly, in *Jerico Constr, Inc*, this Court held that a stipulated order of dismissal entered on the basis of a settlement agreement did not constitute a "verdict" under MCR 2.403(O)(2). *Jerico Constr*, *Inc*, 257 Mich App at 31.

In this case, the parties participated in case evaluation, which resulted in an award in plaintiff's favor in the amount of $11,000. Plaintiff accepted the award, and defendant rejected it. Thereafter, the parties agreed to resolve their dispute regarding the value of plaintiff's loss by participating in the appraisal process set forth in the insurance policy, resulting in an appraisal award of $20,877 in plaintiff's favor. Plaintiff then filed a motion

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[2] The previous version of MCR 2.403(O)(1) at issue in *Saint George*, 204 Mich App at 281-282, stated, in relevant part:

> If a party has rejected an evaluation and the action *proceeds to trial*, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. [Emphasis added.]

This Court reasoned in *Saint George* that the arbitration did not satisfy the "proceeds to trial" language and that merely confirming the arbitration award did not constitute a "verdict" because that interpretation ignored the requirement that the action proceed to trial. *Id*. at 283. The current version of MCR 2.403(O)(1) at issue in this case uses the phrase "proceeds to verdict" rather than "proceeds to trial." This Court in *Saint George* also reasoned, however, that "MCR 2.403 was designed to expedite and simplify the final settlement of cases to avoid a trial," and that the parties were attempting to effectuate that purpose by working "within the framework of arbitration and the arbitration award." *Id*. at 284. Cf. *Cusumano*, 264 Mich App at 238 (holding that case-evaluation sanctions were awardable following arbitration when the arbitration agreement provided that such sanctions shall apply).

for entry of judgment, which the trial court partially granted and thereafter entered judgment in plaintiff's favor. As previously discussed, the appraisal process was effectively an arbitration, and an order or judgment entered pursuant to an arbitration or settlement is not a "verdict" within the meaning of MCR 2.403(O)(2)(c). See *Jerico Constr, Inc*, 257 Mich App at 31; *Saint George*, 204 Mich App at 282-284; *Kwaiser*, 190 Mich App at 486. The trial court's order granting plaintiff's motion for entry of judgment merely confirmed the appraisal award and did not constitute a "verdict" under MCR 2.403(O)(2)(c). Accordingly, the trial court properly denied plaintiff's request for case-evaluation sanctions.

Plaintiff next argues that the trial court erred by denying its request for debris-removal expenses. "Judicial review of an appraisal award is limited to instances of 'bad faith, fraud, misconduct, or manifest mistake.' " *Angott v Chubb Group of Ins Cos*, 270 Mich App 465, 473; 717 NW2d 341 (2006), quoting *Kwaiser*, 190 Mich App at 486. Further, "[t]he question of what constitutes a waiver is a question of law" that we review de novo. *Angott*, 270 Mich App at 469-470 (quotation marks and citation omitted).

Issues involving an insurance policy's coverage are generally for the court to determine, and "[t]he appraisal process cannot legally settle coverage issues . . . . " *Kwaiser*, 190 Mich App at 486-487. "Where the parties cannot agree on coverage, a court is to determine coverage in a declaratory action before an appraisal of the damage to the property." *Id*. at 487. In *Angott*, 270 Mich App at 473-474, this Court held that the defendant insurer waived its coverage-based challenge and was bound by the appraisal award absent bad faith, fraud, misconduct, or manifest mistake when the par-

ties stipulated to submit the plaintiff's claim for appraisal without first seeking court intervention to determine coverage issues.

Here, plaintiff erroneously characterizes its argument regarding debris-removal expenses as a coverage issue and contends that the trial court, rather than the appraisal panel, should have determined the issue. To the contrary, defendant did not assert that debris-removal expenses were not covered under the policy. Rather, it appears that the case proceeded through the appraisal process without plaintiff raising the issue of debris-removal expenses. In a letter accompanying the appraisal award, appraiser Richard Guider stated that "no allowance was made for debris removal, as no evidence ha[d] been presented that the insured incurred any debris removal expense." Thus, the appraisal panel would have addressed debris-removal expenses if plaintiff had submitted evidence showing that it had incurred debris-removal costs. While plaintiff contends that it did not incur such costs until after the appraisal proceedings, it is noteworthy that the appraisal award was issued on September 17, 2010, and the fire occurred on May 27, 2007. By submitting its case for appraisal and proceeding through the appraisal process without raising the issue of debris-removal expenses, plaintiff waived its claim for such expenses. See *Angott*, 270 Mich App at 473-474; see also *id*. at 470 ("Waiver may be shown by proof of express language of agreement or inferably established by such declaration, act, and conduct of the party against whom it is claimed.").

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

FORT HOOD, P.J., and K. F. KELLY and DONOFRIO, JJ., concurred.

RANDOM HOUSE, INC v DEPARTMENT OF TREASURY

Docket No. 307035. Submitted November 15, 2012, at Lansing. Decided November 27, 2012, at 9:05 a.m. Leave to appeal denied, 494 Mich ___.

Random House, Inc., a business entity incorporated in the state of New York that is primarily engaged in the publication and sale of books in interstate commerce, filed Michigan single business tax returns from 1993 to 1996 with regard to business transacted in Michigan. As a result of an Internal Revenue Service audit in 1987 and 1988, Random House had been required to capitalize and depreciate its costs associated with the purchase of original or master manuscripts from authors for federal tax purposes. Random House filed an amended return in 1998 requesting refunds from the Michigan Department of Treasury for capital acquisition deductions for costs incurred when purchasing original or master manuscripts from authors. The Department of Treasury denied the requested refunds. Random House then brought an action in the Court of Claims contesting the denial of the requested refunds. The case was held in abeyance at the request of the parties for more than 10 years and was then reinstated to the active docket at the request of the parties. The parties moved for summary disposition. The Court of Claims, Paula J. M. Manderfield, J., denied defendant's motion and granted plaintiff's motion. Defendant appealed.

The Court of Appeals *held*:

1. The Code of Federal Regulations provides at 26 CFR 1.263A-2(a)(2)(ii) that, for purposes of determining whether a taxpayer producing intellectual or creative property is producing tangible personal property or intangible property, the term tangible personal property includes books and other similar property embodying words, ideas, concepts, images, or sounds by the creator thereof. The costs of producing such tangible property, including prepublication expenditures incurred by publishers and payments made to authors (other than commissions for sales of books that have already taken place), are required by 26 CFR 1.263A-2(a)(2)(ii)(A)(*1*) to be capitalized. In addition, 26 CFR 1.263A-1T(c)(4) provides that costs that are capitalized under § 263A are recovered through depreciation, amortization, cost of

goods sold, or by an adjustment to basis at the time the property is used, sold, placed in service, or otherwise disposed of by the taxpayer.

2. The Internal Revenue Code provides that the estimated useful life of an asset is not necessarily the useful life inherent in the asset but is the period over which the asset may reasonably be expected to be useful to the taxpayer in his or her trade or business or in the production of his or her income. There is no merit to defendant's argument that manuscripts and the stories contained therein are not subject to wear and tear, decay, or decline.

3. Plaintiff's costs associated with the purchase of master manuscripts were not only eligible for depreciation under the Internal Revenue Code, but the Internal Revenue Service actually required plaintiff to depreciate those costs. The provision of the Single Business Tax Act at issue in this case, MCL 208.23(c), provided that after apportionment as provided for in MCL 208.41, the tax base shall be adjusted by deducting the cost, including fabrication and installation, paid or accrued in the taxable year of tangible assets of a type that are, or under the Internal Revenue Code will become, eligible for depreciation, amortization, or accelerated capital cost recovery for federal income tax purposes. Plaintiff's costs at issue are clearly "of a type that are, or under the internal revenue code will become, eligible for depreciation, amortization, or accelerated cost recovery for federal income tax purposes" as required by MCL 208.23(c). The Court of Claims properly granted summary disposition in favor of plaintiff.

Affirmed.

Honigman Miller Schwartz and Cohn LLP (by *Patrick R. Van Tiflin* and *Daniel L. Stanley*) for plaintiff.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Scott L. Damich*, Assistant Attorney General, for defendant.

Before: BORRELLO, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM. Defendant appeals a Court of Claims order granting plaintiff's motion for summary disposition. On appeal, defendant argues that the trial court erred by holding that plaintiff was entitled to capital-

acquisition deductions for the tax years at issue and that defendant had improperly denied plaintiff's request for a tax refund. We affirm.

Plaintiff is a business entity incorporated in the state of New York that is primarily engaged in the publication and sale of books in interstate commerce. From 1993 to 1996, plaintiff transacted business in Michigan. Plaintiff timely filed Michigan single business tax (SBT) returns for those years. In March 1998, plaintiff filed an amended Michigan return requesting refunds from defendant for capital acquisition deductions (CAD) "for costs incurred in its book publication activities." In particular, plaintiff had expended funds purchasing original or "master manuscripts" from authors. For the four years from 1993 through 1996, plaintiff requested refunds of $53,130, $75,235, $41,259, and $29,856, respectively. Defendant denied plaintiff's requested refunds.

On February 11, 2000, plaintiff initiated this lawsuit in the Court of Claims, contesting defendant's denial of the requested refunds. On March 20, 2000, a Court of Claims judge issued an order at the request of the parties holding the case in abeyance pending this Court's decision in *Jefferson Smurfit Corp v Dep't of Treasury*, 248 Mich App 271; 639 NW2d 269 (2001). More than 10 years later, on August 2, 2010, at the request of the parties, another Court of Claims judge removed the case from abeyance and reinstated it to the active docket.

On August 9, 2011, plaintiff moved in the trial court for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff argued that the "costs were of the same type that were capitalized and depreciated for federal tax purposes as required by federal auditors in a prior audit." Plaintiff cited § 263A(b)(1) and (2) of the Internal Revenue Code (IRC), and 26 CFR 1.263A-2(a)(2)(ii)(A)(*1*). IRC 263A provides, in part, as follows:

(a) Nondeductibility of certain direct and indirect costs.

(1) In general. In the case of any property to which this section applies, any costs described in paragraph (2)—

(A) in the case of property which is inventory in the hands of the taxpayer, shall be included in inventory costs, and

(B) in the case of any other property, shall be capitalized.

(2) Allocable costs. The costs described in this paragraph with respect to any property are—

(A) the direct costs of such property, and

(B) such property's proper share of those indirect costs (including taxes) part or all of which are allocable to such property.

Any cost which (but for this subsection) could not be taken into account in computing taxable income for any taxable year shall not be treated as a cost described in this paragraph.

(b) Property to which section applies. Except as otherwise provided in this section, this section shall apply to—

(1) Property produced by taxpayer. Real or tangible personal property produced by the taxpayer.

* * *

For purposes of paragraph (1), the term "tangible personal property" shall include a film, sound recording, video tape, book, or similar property. [IRC 263A(a) and (b); 26 USC 263A(a) and (b).]

26 CFR 1.263A-2(a)(2) provides as follows:

(2) *Tangible personal property*—(i) *General rule*. In general, section 263A applies to the costs of producing tangible personal property, and not to the costs of producing intangible property. For example, section 263A applies to the costs

manufacturers incur to produce goods, but does not apply to the costs financial institutions incur to originate loans.

(ii) *Intellectual or creative property*. For purposes of determining whether a taxpayer producing intellectual or creative property is producing tangible personal property or intangible property, the term tangible personal property includes films, sound recordings, video tapes, books, and other similar property embodying words, ideas, concepts, images, or sounds by the creator thereof. Other similar property for this purpose generally means intellectual or creative property for which, as costs are incurred in producing the property, it is intended (or is reasonably likely) that any tangible medium in which the property is embodied will be mass distributed by the creator or any one or more third parties in a form that is not substantially altered. However, any intellectual or creative property that is embodied in a tangible medium that is mass distributed merely incident to the distribution of a principal product or good of the creator is not other similar property for these purposes.

(A) *Intellectual or creative property that is tangible personal property*. Section 263A applies to tangible personal property defined in this paragraph (a)(2) without regard to whether such property is treated as tangible or intangible property under other sections of the Internal Revenue Code. Thus, for example, section 263A applies to the costs of producing a motion picture or researching and writing a book even though these assets may be considered intangible for other purposes of the Internal Revenue Code. Tangible personal property includes, for example, the following:

(*1*) *Books*. The costs of producing and developing books (including teaching aids and other literary works) required to be capitalized under this section include costs incurred by an author in researching, preparing, and writing the book. (However, see section 263A(h), which provides an exemption from the capitalization requirements of section 263A in the case of certain free-lance authors.) In addition, the costs of producing and developing books include pre-

> publication expenditures incurred by publishers, including payments made to authors (other than commissions for sales of books that have already taken place), as well as costs incurred by publishers in writing, editing, compiling, illustrating, designing, and developing the books. The costs of producing a book also include the costs of producing the underlying manuscript, copyright, or license. (These costs are distinguished from the separately capitalizable costs of printing and binding the tangible medium embodying the book (e.g., paper and ink).) See § 1.174–2(a)(1), which provides that the term research or experimental expenditures does not include expenditures incurred for research in connection with literary, historical, or similar projects.

On September 21, 2011, defendant also moved for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that plaintiff's "focus on the master manuscript is a misleading distraction." "[Plaintiff] has purchased the rights to publish books," and "[plaintiff] has thus acquired an intangible asset." Defendant also argued that IRC 263A does not apply because it "does not affect the nature of the true underlying asset." Defendant asserted that capitalizing "advanced royalty payments" is simply an accounting method, "not depreciation, amortization or accelerated capital cost recovery of a tangible asset." Finally, defendant argued that the Legislature, as shown in the 1995 amendment of MCL 208.23, 1995 PA 282, "always contemplated the physical investment of capital in Michigan." The trial court granted plaintiff's motion after concluding that plaintiff was entitled to claim a CAD for the tax years in issue and ordered defendant to refund plaintiff $194,480.00, plus statutory interest.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008). Issues of statutory interpretation are also subject to review de novo. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011). The

trial court granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). This Court has summarized applicable standards of review as follows:

> "A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court 'must consider the documentary evidence presented to the trial court "in the light most favorable to the nonmoving party." ' A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) 'if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.' " [*American Home Assurance Co v Mich Catastrophic Claims Ass'n*, 288 Mich App 706, 716-717; 795 NW2d 172 (2010) (citations omitted).]

Michigan's Single Business Tax Act (SBTA)[1] imposed "a specific tax upon the adjusted tax base of every person with business activity in this state that is allocated or apportioned to this state . . . . " MCL 208.31(1). "Tax base" was defined as "business income," subject to apportionment, allocation, and adjustment as provided by the SBTA. MCL 208.9(1). "Business income" was defined as "federal taxable income . . . . " MCL 208.3(3). "A taxpayer whose business activities are taxable both within and without this state," such as plaintiff, was required to apportion its tax base as provided by the SBTA. MCL 208.41.

The CAD provision at issue in this case, MCL 208.23(c), provided, in relevant part, as follows:

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[1] Michigan's Single Business Tax Act was repealed by 2006 PA 325 effective for tax years beginning after December 31, 2007.

> After . . . apportionment as provided in [MCL 208.41], the tax base shall be adjusted by the following:
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> * * *
>
> (c) For a tax year beginning after September 30, 1989 but before January 1, 1997 and for tax years beginning after December 31, 1996 and before January 1, 2000 as provided in subdivision (h), *deduct the cost, including fabrication and installation, paid or accrued in the taxable year of tangible assets of a type that are, or under the internal revenue code will become, eligible for depreciation, amortization, or accelerated capital cost recovery for federal income tax purposes.* This deduction shall be multiplied by the apportionment factor for the taxable year as defined in chapter 3. This subdivision does not apply to a taxpayer's first tax year ending after September 29, 1991. [Emphasis added.]

We must therefore determine whether plaintiff's costs were for (1) tangible assets and (2) if so, whether those tangible assets were eligible for depreciation, amortization, or accelerated capital cost recovery under the IRC. At the heart of this appeal is a determination of what exactly is being purchased by plaintiff. Plaintiff argues on appeal, as it did consistently in the Court of Claims, that the costs at issue are associated with purchasing physical "master manuscripts." Defendant argues that the master manuscripts are merely ancillary to plaintiff's actual purchases, which are intangible publication rights.

The parties offer no definition of the term "master manuscripts." However, a "manuscript" is defined as follows: "An unpublished writing; an author's typescript or written work product that is produced for publication." Black's Law Dictionary (7th ed). "Master" is defined, in part, as follows: "Being an original from which copies are made." *The American Heritage Dictionary of the English*

Language (1996). Thus, it is our understanding that plaintiff is claiming that it is buying the original of an unpublished writing that will serve as the foundation for producing copies for sale.

The line between tangible and intangible property is somewhat fuzzy when the issue concerns a literary work. As stated in *Winter v G P Putnam's Sons*, 938 F2d 1033, 1034 (CA 9, 1991), "[a] book containing Shakespeare's sonnets consists of two parts, the material and print therein, and the ideas and expression thereof. The first may be a product, but the second is not." Here, the line has been clarified, at least for tax purposes, by legislative policy choices embodied in the IRC and CFR. 26 CFR 1.263A-2(a)(2)(ii) provides that, "[f]or purposes of determining whether a taxpayer producing intellectual or creative property is producing tangible personal property or intangible property, the term tangible personal property includes . . . books . . . and other similar property embodying words, ideas, concepts, images, or sounds by the creator thereof." The costs of producing such tangible property, including "prepublication expenditures incurred by publishers, including payments made to authors (other than commissions for sales of books that have already taken place)," are required to be capitalized. 26 CFR 1.263A-2(a)(2)(ii)(A)(*1*). See 26 CFR 1.263A-1; IRC 263A. In addition, 26 CFR 1.263A-1T(c)(4) provides:

> **(4) *Recovery of capitalized costs*.** Except as provided in § 1.162–3T(a)(2) (amounts paid to produce incidental materials and supplies), costs that are capitalized under section 263A are recovered through depreciation, amortization, cost of goods sold, or by an adjustment to basis at the time the property is used, sold, placed in service, or otherwise disposed of by the taxpayer. Cost recovery is determined by the applicable Internal Revenue Code and regulation provisions relating to use, sale, or disposition of property.

As a result of an IRS audit in 1987 and 1988, plaintiff was required to capitalize and depreciate its costs associated with the purchase of master manuscripts. Thus, these costs were not only *eligible* for depreciation under the IRC, but the IRS actually *required* plaintiff to depreciate these costs. See 26 CFR 1.263A-2(a)(2)(ii)(A)(*1*).

Defendant's argument that manuscripts and the stories contained therein are not subject to wear and tear, decay, or decline, is without merit. In fact, the IRC provides that, for the purposes of depreciation,

> the estimated useful life of an asset is not necessarily the useful life inherent in the asset but is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business or in the production of his income. This period shall be determined by reference to his experience with similar property taking into account present conditions and probable future developments. [26 CFR 1.167(a)-1(b).]

Defendant characterizes physical depreciation in the colloquial context, rather than in the applicable and appropriate accounting context as provided for by the IRC. Plaintiff's costs at issue in this case are clearly "of a type that are, or under the internal revenue code will become, eligible for depreciation, amortization, or accelerated capital cost recovery for federal income tax purposes" as required by the statute. MCL 208.23(c).

Affirmed.

BORRELLO, P.J., and FITZGERALD and OWENS, JJ., concurred.

LaFONTAINE SALINE INC v CHRYSLER GROUP LLC

Docket No. 307148. Submitted November 14, 2012, at Detroit. Decided November 27, 2012, at 9:10 a.m. Leave to appeal sought.

LaFontaine Saline Inc., an authorized dealer of Chrysler motor vehicles, brought an action for declaratory relief in the Washtenaw Circuit Court against Chrysler Group LLC and IHS Automotive Group, LLC, under the motor vehicle dealers act (MVDA), MCL 445.1561 *et seq*., after receiving notice that Chrysler and IHS intended to enter into a dealer agreement that would allow IHS to establish a Dodge dealership within nine miles of plaintiff's dealership if IHS built a facility that met Chrysler's specifications, as set forth in a letter of intent. Defendants moved for summary disposition, arguing that plaintiff lacked standing to bring an action under the version of the MVDA in effect when the letter of intent was signed because the proposed IHS dealership was not located within six miles of plaintiff's dealership, the then applicable radius giving rise to a cause of action under MCL 445.1576(3). The court, David S. Swartz, J., entered an order granting defendant's motion for summary disposition under MCR 2.116(C)(10), concluding that the letter of intent to enter into a dealer agreement between Chrysler and IHS itself constituted a dealer agreement, which rendered the six-mile threshold applicable. The trial court denied plaintiff's motion for reconsideration of the order in part on the ground that, because defendants had not yet executed a sales and service agreement with respect to the Dodge vehicle line, plaintiff's claim was not ripe for adjudication. Plaintiff appealed.

The Court of Appeals *held*:

1. The court erred by applying the definition of "relevant market area" in effect when defendants' letter of intent was signed when granting summary disposition because defendants' letter of intent did not constitute a dealer agreement. MCL 445.1576(2) requires a manufacturer or distributor that seeks to enter into a dealer agreement that establishes a new-motor-vehicle dealer to first give written notice of this intention to each new-motor-vehicle dealer of the same line make in the relevant market area. Under MCL 445.1576(3), within 30 days after receiving this notice,

a dealer may bring a declaratory judgment action to determine whether good cause exists for the establishing or relocating of a proposed new-motor-vehicle dealer. Hence, an existing like-line dealer does not have a cause of action under the MVDA to challenge a proposed dealer agreement unless the existing dealer is located within the relevant market area of the proposed new vehicle line dealer. On February 10, 2010, Chrysler sent IHS a letter of intent stating that Chrysler would accept IHS's offer to enter into a Dodge sales and service agreement with IHS if IHS provided a new facility for the exclusive display, sales, and service of Dodge, Chrysler, and Jeep vehicle lines that complied with the provisions of the letter of intent. At the time, "relevant market area" was defined as the area within a radius of six miles of the intended site of the proposed or relocated dealer, but effective August 4, 2010, the statute was amended to expand the relevant market area to the area within a radius of nine miles. IHS is located more than six miles, but within nine miles, of plaintiff. When the letter of intent was signed, MCL 445.1562(2) defined "dealer agreement" as an agreement or contract that purports to establish the legal rights and obligations of the parties to the agreement or contract with regard to the purchase and sale of new motor vehicles and accessories for motor vehicles. The parties' letter of intent did not purport to establish the legal rights and obligations regarding the sale of new motor vehicles and accessories but rather concerned the construction of a new facility; therefore, the letter of intent was not a dealer agreement. Because any dealer agreement between Chrysler and IHS will necessarily be executed after 2010 PA 139 took effect, plaintiff was located within the "relevant market area" and plaintiff could maintain an action under MCL 445.1576(3) to determine whether good cause exists to establish the proposed Dodge vehicle line at IHS. Therefore, the court erred by granting summary disposition.

2. The court erred by concluding that plaintiff's claim was not ripe for adjudication. A claim is not ripe if it rests upon contingent future events that may not occur as anticipated or may not occur at all, and there must be a genuine case or controversy between the parties in which there is a real, not a hypothetical, dispute. In this case, the genuine case or controversy was whether good cause existed for establishing the Dodge vehicle line at IHS. Plaintiff's cause of action was specifically provided for under MCL 445.1576, which requires a manufacturer to provide notice to a like-line dealer of its intent to establish a new vehicle line in the relevant market area before entering into a dealer agreement and allows a like-line dealer to commence a declaratory judgment action to determine whether good cause exists for establishing the proposed

vehicle line. Because plaintiff, a Dodge dealer, was located within the nine-mile relevant market area where Chrysler intended to establish the Dodge vehicle line at IHS, and because plaintiff received notice that Chrysler intended to award the Dodge line to IHS, plaintiff had standing to file a declaratory action to determine whether good cause existed to establish the Dodge vehicle line at IHS. Whether good cause existed was not contingent on future events that may not occur.

Reversed and remanded.

ACTIONS — DECLARATORY ACTIONS — RIPENESS — MOTOR VEHICLE DEALERS ACT — DEALER AGREEMENTS — NEW MOTOR VEHICLE DEALERS IN AREA ALREADY SERVED.

A claim is not ripe if it rests upon contingent future events that may not occur as anticipated or may not occur at all; for a claim to be ripe there must be a genuine case or controversy between the parties in which there is a real rather than a hypothetical dispute; a motor vehicle dealer may file a declaratory action under MCL 445.1576(3) to determine whether there is good cause to establish a new motor vehicle dealer in the relevant market area where the same vehicle line make is represented after receiving notice that a motor vehicle manufacturer or distributor intends to do so.

Dawda, Mann, Mulcahy & Sadler, PLC (by *Suanne Tiberio Trimmer* and *Randal R. Cole*), and *Ward M. Powers* for LaFontaine Saline Inc.

Dykema Gossett PLLC (by *Jill M. Wheaton* and *Thomas S. Bishoff*) for Chrysler Group LLC.

Williams, Williams, Rattner & Plunkett, P.C. (by *David E. Plunkett* and *Ernest J. Essad, Jr.*), for IHS Automotive Group, LLC.

Before: BORRELLO, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM. Plaintiff, LaFontaine Saline Inc., an authorized dealer of Chrysler motor vehicles, appeals as of right a September 19, 2011, trial court order granting summary disposition in favor of defendants Chrysler Group LLC and IHS Automotive. Plaintiff filed a com-

plaint for declaratory relief pursuant to MCL 445.1576(3), a subsection of the motor vehicle dealers act (MVDA), MCL 445.1561 *et seq*., seeking an order prohibiting Chrysler from adding the Dodge vehicle line at IHS, a Chrysler dealer located within the amended definition of "relevant market area" contained in the MVDA. The trial court concluded that the definition of "relevant market area" from a previous version of the statute applied and that plaintiff therefore fell outside the "relevant market area" and did not have standing under MCL 445.1576(3) to challenge the addition of the Dodge vehicle line at IHS. For the reasons set forth in this opinion, we reverse the trial court's order and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff is an automobile dealer located in Saline, Michigan. On September 24, 2007, plaintiff and Chrysler executed three separate sales and services agreements (SSAs): a Chrysler SSA, a Jeep SSA, and a Dodge SSA. Under the terms of the SSAs, Chrysler granted plaintiff the nonexclusive right to purchase and resell Chrysler, Dodge, and Jeep vehicles at plaintiff's dealership. The SSAs provided that plaintiff "will actively and effectively sell and promote the retail sale of [Chrysler] vehicles, vehicle parts and accessories in [plaintiff's] Sales Locality." However, the SSAs also provided that the "Sales Locality may be shared with other [Chrysler] dealers of the same line-make as [Chrysler] determines to be appropriate."

Though Chrysler's right to establish other dealers was not limited under the SSAs, it is limited by the MVDA. Specifically, MCL 445.1576(2) provides that "[b]efore a manufacturer or distributor enters into a *dealer agreement* establishing . . . a new motor vehicle dealer within a

relevant market area where the same line make is represented, the manufacturer or distributor shall give written notice to each new motor vehicle dealer of the same line make *in the relevant market area* . . . . " (Emphasis added.) Upon receipt of this notice, an existing like-line dealer in the relevant market area "may bring a declaratory judgment action . . . to determine whether good cause exists for the establishing . . . of a proposed new motor vehicle dealer." MCL 445.1576(3). Hence, an existing like-line dealer does not have a cause of action under the MVDA to challenge a proposed dealer agreement unless the existing dealer is located within the "relevant market area" of the proposed new vehicle line dealer.

At the time plaintiff executed the SSAs with Chrysler, the MVDA defined "relevant market area" in pertinent part as follows:

> For a proposed new motor vehicle dealer or a new motor vehicle dealer who plans to relocate his or her place of business in a county having a population which is greater than 25,000, the area within a *radius of 6 miles* of the intended site of the proposed or relocated dealer. [MCL 445.1566(1)(a), as amended by 1983 PA 188 (emphasis added).]

Effective August 4, 2010, the definition of "relevant market area" for counties with a population of more than 150,000 was amended by 2010 PA 139, and now provides in pertinent part:

> In a county that has a population of more than 150,000, the area within a *radius of 9 miles* of the site of the intended place of business of a proposed new vehicle dealer or the intended place of business of a new vehicle dealer that plans to relocate its place of business. [MCL 445.1566(1)(a) (emphasis added).]

It is undisputed that plaintiff is located in a county with a population of more than 150,000 (specifically,

Washtenaw County). IHS is a vehicle dealer located more than six miles, but within nine miles, of plaintiff. On February 2, 2010, before the effective date of 2010 PA 139, IHS and Chrysler entered into a letter of intent agreement (LOI) regarding Chrysler's Dodge vehicle line. The LOI provided that IHS "requested that Chrysler . . . enter into a Dodge Sales and Service Agreement" with IHS. The LOI further provided that Chrysler would accept IHS's offer to enter into an agreement "in its then-customary form" if IHS provided a new facility for the "exclusive display, sales and service of Dodge, Chrysler and Jeep vehicle lines that complies with the provisions of this [LOI]" and if IHS completed "all of the requirements of this LOI within the time periods set forth in this LOI."

The LOI then set forth all the requirements for the facility and stated:

> Completion of all of the requirements of this LOI to [Chrysler's] satisfaction within the time periods specified herein and by the Expiration Date are material terms of this LOI. Failure to complete these requirements within the time periods specified herein will be a material breach of this LOI and [Chrysler] will have the right to terminate this LOI. Furthermore, any obligation of [Chrysler] to enter into [a Dodge Sales and Service Agreement] with You will be void and [Chrysler] will have no further obligation to You nor any liability to You.

Sometime in 2010, plaintiff learned that Chrysler intended to award the Dodge vehicle line to IHS. Thereafter, on September 3, 2010, plaintiff sent a letter to Chrysler advising it that IHS was located within the new nine-mile relevant market area of plaintiff. The letter further stated that "[plaintiff] . . . is protesting any additional Chrysler Dodge Jeep Ram franchise in our market area of responsibility." Chrysler responded

in a letter to plaintiff that Chrysler "intend[ed] to approve the establishment of a Dodge car and truck vehicle line" at IHS.

On December 9, 2010, plaintiff filed a complaint for declaratory relief requesting that the trial court enter an order precluding Chrysler from awarding the Dodge vehicle line to IHS. Chrysler and IHS moved for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10), arguing that because the LOI constituted a "dealer agreement" that was effectuated before the 2010 statutory amendment, the six-mile relevant market area governed whether plaintiff had standing to challenge the new vehicle line. Specifically, defendants essentially argued that, because IHS was not located within six miles of plaintiff, plaintiff lacked standing to challenge the proposed action under MCL 445.1576(3). Chrysler and IHS also argued that the amended nine-mile relevant market area did not have retroactive effect.

Plaintiff responded, arguing that the 2010 statutory amendments applied in the instant case and that the nine-mile relevant market area therefore governed; hence, under plaintiff's theory, plaintiff would have standing under MCL 445.1576(3) to challenge the proposed Dodge vehicle line. In particular, plaintiff argued that the LOI did not constitute the operative "dealer agreement" to establish the Dodge line. Instead, plaintiff argued that the LOI was simply a prelude to the ultimate "dealer agreement" that Chrysler intended to enter with IHS. Plaintiff stated that the LOI did not actually award the Dodge vehicle line to IHS; rather, it included a number of contingencies that had to be completed by IHS before the ultimate dealer agreement would be executed. Because defendants' dealer agreement would be entered sometime after the 2010 statu-

tory amendment, plaintiff argued, the nine-mile relevant market area applied. Under plaintiff's theory, because plaintiff was located within the nine-mile relevant market area, it had standing to challenge defendants' actions pursuant to MCL 445.1576(3).

Chrysler responded, arguing that the LOI was a binding contract that fixed Chrysler's and IHS's rights as of the date of the agreement. Chrysler stated that the purpose of the LOI was to bind the parties to enter into a Dodge SSA upon IHS's performance of the LOI. Chrysler argued that the mere fact that the LOI did not contain the terms of the Dodge SSA was immaterial given that (1) the LOI referred to the Dodge SSA, (2) both parties were aware of the terms of the standard Dodge SSA, and (3) both parties acknowledged that they understood and agreed to those terms.

Following oral argument, the trial court entered an order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(10). The trial court concluded that the LOI fell within the statutory definition of "dealer agreement" under MCL 445.1562(3). The court reasoned that the LOI represented the "entire agreement" between defendants that " 'purports to establish the legal rights and obligations of the parties to the agreement or contract', and, as such, will necessarily be 'incorporated by reference' into any 'form' dealer agreement signed by [d]efendants." Given that the LOI constituted the operative dealer agreement, and given that the LOI was executed before the 2010 statutory amendment, under the trial court's reasoning, the preamendment six-mile relevant market area governed for purposes of standing. Accordingly, because plaintiff fell outside the six-mile relevant market area, plaintiff lacked standing to challenge the new vehicle line under MCL 445.1576(3), and the trial court granted

defendants' motions and dismissed plaintiff's complaint. This appeal ensued.

II. STANDARD OF REVIEW

Plaintiff contends that the trial court erred when it granted summary disposition and erred when it concluded that the LOI constituted the operative dealer agreement between Chrysler and IHS to establish the Dodge vehicle line, thus making the preamendment six-mile relevant market area applicable in this case.

We review de novo a trial court's decision to grant summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). The trial court granted defendants' motions for summary disposition pursuant to MCR 2.116(C)(10). Summary disposition of all or part of a claim is proper under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When deciding a motion under MCR 2.116(C)(10), the court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). To the extent we must interpret and apply the relevant provisions of the MVDA, issues of statutory construction involve questions of law that we review de novo. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

III. ANALYSIS

The MVDA generally governs the relationship between motor vehicle manufacturers, distributors, wholesalers, and dealers. Relevant to this appeal is MCL 445.1576(2) and (3), which provide in pertinent part as follows:

> (2) Before a manufacturer or distributor enters into a *dealer agreement* establishing or relocating a new motor vehicle dealer *within a relevant market area* where the same line make is represented, the manufacturer or distributor shall give written notice to each new motor vehicle dealer of the same line make in the relevant market area of its intention to establish an additional dealer or to relocate an existing dealer within that relevant market area.
>
> (3) Within 30 days after receiving the notice provided for in subsection (2), or within 30 days after the end of any appeal procedure provided by the manufacturer or distributor, a new motor vehicle dealer may bring a declaratory judgment action in the circuit court for the county in which the new motor vehicle dealer is located to determine whether good cause exists for the establishing or relocating of a proposed new motor vehicle dealer. [Emphasis added.]

In this case, on February 10, 2010, Chrysler sent IHS an LOI. The LOI stated that IHS has "requested that Chrysler . . . enter into a Dodge Sales and Service Agreement . . . with [IHS] . . . . " The LOI further stated that Chrysler "will accept Your offer to enter into an Agreement in its then-customary form, with You if You provide a new facility . . . for the exclusive display, sales and service of Dodge, Chrysler and Jeep vehicle lines that complies with the provisions of this . . . [LOI], and if You have completed all of the requirements of this LOI within the time periods set forth in this LOI."

At the time Chrysler sent IHS the LOI, the MVDA defined "relevant market area" as "the area within a radius of 6 miles of the intended site of the proposed or relocated dealer." MCL 445.1566(a), as amended by 1983 PA 188. However, effective August 4, 2010, the definition of "relevant market area" for counties with a population of more than 150,000 was amended by 2010 PA 139, which expanded the "relevant market area" to "the area within a radius of 9 miles . . . ." MCL 445.1566(1)(a). IHS is located more than six miles, but

within nine miles, of plaintiff. Because plaintiff does not argue that 2010 PA 139 applies retroactively, the central issue in this case is whether the LOI is a "dealer agreement" under the MVDA. If the LOI is a binding dealer agreement, then the six-mile radius applies and plaintiff lacks standing under MCL 445.1576(3) because the LOI was signed before the effective date of 2010 PA 139. However, if the LOI is not a dealer agreement, then the nine-mile radius applies and plaintiff has standing under MCL 445.1576(3) because any dealer agreement between Chrysler and IHS will necessarily be executed after the effective date of the amendment. Therefore, we proceed by examining the definition of "dealer agreement" set forth in the MVDA.

When IHS and Chrysler executed the LOI, the MVDA defined "dealer agreement" in pertinent part as follows:

> "Dealer agreement" means the agreement or contract in writing between . . . . a manufacturer and a . . . new motor vehicle dealer . . . which purports to establish the legal rights and obligations of the parties to the agreement or contract with regard to the purchase and sale or resale of new motor vehicles and accessories for motor vehicles. [MCL 445.1562(2), as amended by 1998 PA 456.]

Effective August 4, 2010, the definition of "dealer agreement" was amended by 2010 PA 140 and currently provides in pertinent part:

> "Dealer agreement" means an agreement or contract in writing . . . between a manufacturer and . . . a new motor vehicle dealer . . . that purports to establish the legal rights and obligations of the parties to the agreement or contract and under which the dealer purchases and resells new motor vehicles and conducts service operations. The term includes the sales and service agreement, regardless of the terminology used to describe that agreement, and any addenda to the dealer agreement, including all schedules,

> attachments, exhibits, and agreements incorporated by reference into the dealer agreement. [MCL 445.1562(3).]

In this case, the trial court applied the amended definition of "dealer agreement"; however, given that the LOI was signed before the effective date of the amendment, the preamendment definition of "dealer agreement" is controlling. Under the preamendment definition, " '[d]ealer agreement' means the agreement or contract . . . which purports to establish the legal rights and obligations of the parties to the agreement or contract *with regard to the purchase and sale . . . of new . . . motor vehicles and accessories for motor vehicles*." MCL 445.1562(2), as amended by 1998 PA 456 (emphasis added). In this case, the LOI does not purport to establish the legal rights and obligations regarding the sale of new motor vehicles and accessories. Rather, the LOI concerns the construction of a "new facility . . . for the exclusive display, sales and service of Dodge, Chrysler and Jeep vehicle lines . . . ." Indeed, paragraph 13 of the LOI states that "[t]his LOI constitutes [IHS] and [Chrysler's] entire agreement *concerning the establishment of the Facility*" (emphasis added). Thus, by its plain language, the subject matter of the LOI was the establishment of a new facility. Nothing within the LOI gave IHS the legal right to purchase and sell the Dodge vehicle line. Instead, the LOI was a prelude to the ultimate dealer agreement that IHS and Chrysler anticipated entering into at some point in the future. IHS was required to timely complete a new facility that complied with the requirements of the LOI, at which time Chrysler would accept IHS's offer to enter into a Dodge SSA. Therefore, under the preamendment definition, the LOI was not a "dealer agreement."[1] Accord-

[1] Even assuming the amended definition of "dealer agreement" governed in this case, our analysis would result in the same outcome. Under

ingly, any future dealer agreement between Chrysler and IHS will necessarily be executed after 2010 PA 139 took effect; thus, plaintiff is located within the "relevant market area" and plaintiff can maintain an action under MCL 445.1576(3) to determine whether good cause exists to establish the proposed Dodge vehicle line at IHS.

The trial court erred when it concluded that "the LOI comports with the 'ascribed meaning' of 'dealer agreement' set forth in the statute, which is, 'an agreement or contract in writing . . . that purports to establish the legal rights and obligations of the parties to the agreement or contract . . . .' " This conclusion is erroneous because the court failed to consider the underlying subject matter of the LOI. An agreement is not a dealer agreement simply because it "purports to establish the legal rights and obligations of the parties to the agreement or contract." Instead, the agreement must purport to establish the legal rights of the parties regarding the "purchase and sale or resale of new and unaltered motor vehicles and accessories for motor vehicles." As noted, the LOI at issue concerned prerequisites (i.e., construction of a facility) that IHS must fulfill before Chrysler would honor its request to enter into a Dodge SSA. The LOI did not govern the legal rights and obligations regarding IHS's sale of Dodge vehicles. Therefore, the trial court erred when it concluded

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the amended definition, " '[d]ealer agreement' means an agreement or contract . . . that purports to establish the legal rights and obligations of the parties to the agreement or contract and *under which the dealer purchases and resells new motor vehicles and conducts service operations*." MCL 445.1562(3) (emphasis added). The LOI was not an agreement under which IHS would purchase and resell Dodge vehicles and conduct service operations. Rather, as discussed, it was a prelude to an agreement under which IHS would purchase and resell Dodge vehicles from Chrysler. Thus, even under the amended definition, the LOI was not a "dealer agreement."

otherwise and erred by granting defendants' motions for summary disposition. Accordingly, reversal and remand for further proceedings is appropriate.[2]

Plaintiff also contends that the trial court erred when, in denying plaintiff's motion for reconsideration, it ruled that plaintiff's claim was not ripe for adjudication. We review de novo questions concerning justiciability, including the doctrine of ripeness, on appeal. *Huntington Woods v Detroit*, 279 Mich App 603, 614; 761 NW2d 127 (2008).

The doctrine of ripeness focuses on the timing of an action and is "designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id*. at 615-616 (citation and quotation marks omitted). When considering whether courts may properly exercise judicial power to decide an issue, "the most critical element" is the "requirement of a genuine case or controversy between the parties, one in which there is a real, not a hypothetical, dispute." *Id*. at 615 (quotation marks and citations omitted).

In this case, in its motion for reconsideration, plaintiff argued that discovery into defendants' Dodge SSA was necessary to evaluate the LOI in light of the SSA. In denying plaintiff's motion, the trial court concluded that if the unsigned Dodge SSA was the operative "dealer agreement" under the MVDA, then plaintiff's complaint was not ripe because it was contingent on

[2] Plaintiff also contends that the trial court erred when it ruled that there were no genuine issues of material fact; however, given our conclusion that the trial court erred by granting summary disposition, we need not address this aspect of plaintiff's appeal.

"future events that may not occur as anticipated or may not occur at all." This conclusion was legally erroneous.

The genuine case or controversy here is whether good cause exists for establishing the Dodge vehicle line at IHS. As discussed earlier, plaintiff's cause of action is specifically provided for under MCL 445.1576(2) and (3). Contrary to the trial court's conclusion, the fact that no dealer agreement had been executed between Chrysler and IHS is irrelevant to the issue of ripeness. Specifically, MCL 445.1576(2) requires a manufacturer to provide notice to a like-line dealer of its intent to establish a new vehicle line "[*b*]*efore* a manufacturer or distributor enters into a dealer agreement . . . ." (Emphasis added.) Once the like-line dealer has notice, that dealer can commence a declaratory judgment action to determine whether good cause exists for establishing the proposed vehicle line. MCL 445.1576(3). Thus, under the plain language of the statute, it is not necessary that a dealer agreement actually be in place before an existing like-line dealer can file a declaratory action. All that is required is a notice of intent to "establish an additional dealer . . . within that relevant market area" where the same vehicle line make is represented. MCL 445.1576(2).

As discussed, plaintiff, a Dodge dealer, is located within the nine-mile relevant market area where Chrysler intends to establish the Dodge vehicle line at IHS. Plaintiff received notice that Chrysler intended to award the Dodge line to IHS. Therefore, under MCL 445.1576(3), plaintiff had standing to file a declaratory action to determine whether "good cause exists for the establishing . . . of a proposed new motor vehicle dealer." MCL 445.1576(3). Whether good cause exists for the establishment of the Dodge vehicle line at IHS is not contingent on future events that may not occur.

Thus, the case is ripe for adjudication, and the trial court erred by concluding otherwise.

For these reasons, the trial court's order is reversed and the case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, having prevailed, may tax costs pursuant to MCR 7.219.

BORRELLO, P.J., and FITZGERALD and OWENS, JJ., concurred.

ANGELUCCI v DART PROPERTIES INCORPORATED

Docket No. 305688. Submitted November 14, 2012, at Detroit. Decided November 29, 2012, at 9:00 a.m. Vacated in part and special panel of the Court of Appeals convened to resolve conflict, 298 Mich App 801.

Domenico Angelucci filed an action against Dart Properties Incorporated; Oak Hill II; Dart Properties II, LLC; Beth Albrough; and others in the Oakland Circuit Court, seeking a temporary restraining order enjoining plaintiff's eviction and asserting claims of negligence, violation of the Michigan Notary Public Act, MCL 55.261 *et seq*., violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq*., fraudulent misrepresentation, fraudulent concealment, negligent misrepresentation, intentional infliction of emotional distress, and unlawful interference with a possessory interest. Plaintiff entered into a residential lease agreement with Oak Hill on December 1, 2010 for a property located in Shelby Township in Macomb County. The dispute arose over whether plaintiff had timely paid his April 2011 rent, and Oak Hill ultimately commenced a summary-proceedings action against plaintiff in district court, which was dismissed after plaintiff paid the full amount requested. After plaintiff filed the instant action, defendants moved for a change of venue, arguing that venue was proper in Macomb County where the alleged tortious acts occurred, where plaintiff resided, where Oak Hill's registered office was located, and where all defendants except Dart Properties II and Albrough resided or had their principal offices. The circuit court, Daniel Patrick O'Brien, J., granted defendants' motion, concluding that venue was proper in Macomb County pursuant to MCL 600.1629(1)(b)(*i*). Plaintiff appealed by leave granted.

The Court of Appeals *held*:

Venue in Michigan is controlled by statute. The plaintiff has the burden of establishing that the county it chose is a proper venue and must present some credible factual evidence that the venue chosen was proper. Venue in cases involving multiple causes of action are governed by MCL 600.1641, as interpreted in *Provider Creditors Comm v United American Health Care Corp*, 275 Mich App 90 (2007). As interpreted in that case, MCL 600.1641(2)

provides that venue is determined under the rules applicable to tort actions as provided in MCL 600.1629 if one of the causes of action "is based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death." Because the phrase "personal injury" is undefined within the chapter of the Revised Judicature Act that contains MCL 600.1641, *Provider Creditors* used the definition set forth in MCL 600.6301, which defined "personal injury" as bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm. MCR 7.215(J)(1) constrained the panel to follow *Provider Creditors* and hold that the circuit court erred by granting defendants' motion to change venue to Macomb County and that venue was proper in Oakland County. Because plaintiff did not seek damages for property damage, wrongful death, or "personal injury" as defined in *Provider Creditors*, venue was not determined by MCL 600.1641(2) and MCL 600.1629. Rather, under MCL 600.1641(1), because the causes of action were joined, venue was proper in any county in which any of the causes of action could have been brought separately. Under MCL 600.1621(a), venue is proper in the county in which a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located. Thus, venue was proper in Oakland County because Albrough resided there. The panel, however, further stated that *Provider Creditors* had erred in its interpretation of MCL 600.1641(2), in particular by failing to properly apply the last antecedent rule. When properly interpreted, MCL 600.1641(2) requires application of the tort venue provision if any of the causes of action is based on tort, as several were in this case. Had the panel not been bound to follow *Provider Creditors*, it would have affirmed the circuit court's grant of defendants' motion to change venue to Macomb County, where the injury occurred and plaintiff resides. The panel called for the convening of a special panel of the Court of Appeals in accordance with MCR 7.215(J) to resolve the conflict.

Reversed and remanded.

Law Offices of Daniel C. Flint, P.C. (by *Daniel C. Flint*), for Domenico Angelucci.

Galloway and Collens PLLC (by *T. Scott Galloway*) for Dart Properties Incorporated; Oak Hill II; Dart Properties II, LLC; Beth Albrough; and others.

Before: FORT HOOD, P.J., and K. F. KELLY and DONOFRIO, JJ.

DONOFRIO, J. Plaintiff, Domenico Angelucci, appeals by delayed leave granted the trial court's order granting defendants' motion to change venue. Because the trial court correctly determined that venue is proper in Macomb County pursuant to MCL 600.1629(1)(b)(*i*), but MCR 7.215(J)(1) requires us to follow the rule of law announced in *Provider Creditors Comm v United American Health Care Corp*, 275 Mich App 90, 94; 738 NW2d 770 (2007), we must reverse and remand for further proceedings. Pursuant to MCR 7.215(J)(2), we explain our disagreement with *Provider Creditors Comm* in part III of this opinion, and we call for the convening of a special panel of this Court in accordance with MCR 7.215(J)(3).

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This action arises out of a residential lease agreement that plaintiff, as the tenant, and defendant Oak Hill II, as the landlord, executed on December 1, 2010. The property is located in Shelby Township, in Macomb County. According to the agreement, plaintiff's monthly rent was $635, which included a monthly concession in the amount of $125 for on-time payments. Plaintiff's rent was due on the first day of every month. If plaintiff failed to pay his rent by the fifth day of the month, he forfeited the monthly concession and was required to pay $125 in addition to his regular payment of $635 plus a late charge.

The dispute in this case involves whether plaintiff timely paid his April 2011 rent. According to plaintiff, he paid his April 2011 rent by a check in the amount of $635, dated March 25, 2011, and mailed on or about that date. Defendants, on the other hand, maintain that

plaintiff failed to timely pay his April 2011 rent, resulting in Oak Hill II sending plaintiff a notice of demand for possession for non-payment of rent requesting that plaintiff pay a total of $869.88, which included his monthly rent, a fire/police fee, a pet fee, an electricity charge, and a late fee. Defendant Beth Albrough, an Oak Hill II employee, notarized the document. On or about April 12, 2011, plaintiff mailed a personal check in the amount of $869.88, which was returned to him with a letter indicating that any payment received after the fifth of the month had to be paid using certified funds. The letter was written on "Dart Properties" letterhead and signed by Albrough. The letter also advised that because plaintiff had failed to make his full payment, his account had been charged a $190 legal fee and sent to defendants' attorney for processing. The letter requested payment in full in the amount of $1,059.88 in certified funds. Ultimately, Oak Hill II commenced a summary-proceedings action against plaintiff in district court, which was dismissed after plaintiff paid the full amount requested.

On May 2, 2011, plaintiff filed this action against Oak Hill II and the other defendants, including Albrough, in the Oakland Circuit Court.[1] The complaint purported to be on behalf of plaintiff "and all others similarly situated" and sought a temporary restraining order enjoining plaintiff's eviction. Plaintiff asserted claims of negligence, violation of the Michigan Notary Public Act, MCL 55.261 *et seq*., violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq*., fraudulent misrepresentation, fraudulent concealment, negligent misrepresentation, intentional infliction of emotional distress, and unlawful interference with a possessory interest.

[1] Plaintiff alleged that defendant Dart Properties II, LLC or Dart Properties Incorporated, both, managed, owned, and operated Oak Hill II.

Defendants filed a motion for a change of venue, arguing that venue was proper in Macomb County, where the alleged tortious acts occurred, where plaintiff resided, where Oak Hill II's registered office was located, and where all defendants except Dart Properties II, LLC, and Beth Albrough resided or had their principal offices. In response, plaintiff argued that defendant "Dart Properties"[2] owns or manages seven apartment complexes located in Oakland and Macomb Counties. Plaintiff maintained that although the class had not yet been defined or certified, it could number into the thousands and include residents and former residents in any one of the seven apartment complexes. Plaintiff asserted that venue was not proper in Macomb County pursuant to MCL 600.1629(1)(b)(*i*) because he brought this action on behalf of himself "and all others similarly situated." Plaintiff maintained that venue was proper in Oakland County under MCL 600.1621(a) because that county is where "a defendant resides, has a place of business, or conducts business . . . ." Plaintiff further argued that venue was proper in Oakland County pursuant to MCL 600.1641(1) and that MCL 600.1641(2) was inapplicable because plaintiff did not seek damages "for personal injury, property damage, or wrongful death . . . ." The trial court granted defendants' motion, concluding that venue was proper in Macomb County pursuant to MCL 600.1629(1)(b)(*i*) because plaintiff resides in that county.

II. STANDARD OF REVIEW

We review for clear error a trial court's decision on a motion to change venue. *Dimmitt & Owens Fin, Inc v*

[2] It is undisputed that at the time that plaintiff's cause of action arose defendant Dart Properties Incorporated had merged with defendant Dart Properties II, LLC.

Deloitte & Touche (ISC), LLC, 481 Mich 618, 624; 752 NW2d 37 (2008). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. Further, we review de novo questions involving statutory interpretation. *Id*. "In doing so, our primary obligation is to discern legislative intent as reflected in the plain language of the statute. When the language of a statute is unambiguous, the Legislature's intent is clear, and judicial construction is neither necessary nor permitted." *Id*. (citation omitted).

III. LEGAL ANALYSIS

In Michigan, venue is controlled by statute. *Id*. "[T]he plaintiff has the burden to establish that the county it chose is a proper venue" and "must present some credible factual evidence that the venue chosen is proper." *Provider Creditors Comm*, 275 Mich App at 94. In cases involving multiple causes of action, courts look to MCL 600.1641 to determine venue. *Shiroka v Farm Bureau Gen Ins Co of Mich*, 276 Mich App 98, 104; 740 NW2d 316 (2007). MCL 600.1641 states:

> (1) Except as provided in subsection (2), if causes of action are joined, whether properly or not, venue is proper in any county in which either cause of action, if sued upon separately, could have been commenced and tried, subject to separation and change as provided by court rule.
>
> (2) If more than 1 cause of action is pleaded in the complaint or added by amendment at any time during the action and 1 of the causes of action is based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, venue shall be determined under the rules applicable to actions in tort as provided in [MCL 600.1629].

Defendants argue that because plaintiff pleaded multiple causes of action, some of which are based on tort,

MCL 600.1641(2) is applicable and directs that venue be determined as set forth in MCL 600.1629, which pertains to tort actions. Plaintiff, on the other hand, argues that MCL 600.1641(2) is inapplicable because he is not seeking damages for property damage, wrongful death, or "personal injury" as this Court interpreted that term in *Provider Creditors Comm*, 275 Mich App at 95-96. Plaintiff thus contends that MCL 600.1641(1) controls venue in this case. Although we believe that *Provider Creditors Comm* was wrongly decided, we are constrained to follow the rule of law articulated in that case pursuant to MCR 7.215(J)(1).

In *Provider Creditors Comm*, 275 Mich App at 93, 96, the plaintiff filed a complaint against the defendants in the Ingham Circuit Court alleging, among other causes of action, negligence, fraud, negligent misrepresentation, innocent misrepresentation, and conversion. The defendants filed a motion to change venue to the Wayne Circuit Court, which the trial court denied. *Id*. at 93-94. On appeal, the defendants argued that MCL 600.1641(2) controlled venue because the plaintiff had asserted tort claims in addition to other causes of action. This Court disagreed, focusing on the meaning of the term "personal injury" as used in MCL 600.1641(2). This Court recognized that the chapter of the Revised Judicature Act (RJA) that contains MCL 600.1641 does not define "personal injury." *Id*. at 95. As such, this Court relied on the definition of "personal injury" set forth in MCL 600.6301, which defines the term as "bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm." *Id*. at 95-96. This Court reasoned:

> Although personal injury as defined in MCL 600.6301 expressly applies only to chapter 63 of the RJA, we conclude that this definition of "personal injury" best reflects the plain meaning of the phrase as it is used in MCL

> 600.1641. Applying that definition here, it is clear from plaintiff's pleadings that plaintiff does not seek damages for "bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm." MCL 600.6301(b). Therefore, plaintiff is not "seeking damages for personal injury . . . ." MCL 600.1641(2). Further, plaintiff's pleadings do not support the conclusion that plaintiff seeks damages for property damage or wrongful death. Therefore, MCL 600.1641(2) does not control venue for this action. [*Id*. at 96.]

In our view, the Court in *Provider Creditors Comm* erred by focusing solely on the phrase "personal injury, property damage, or wrongful death" in MCL 600.1641(2). When interpreting statutory language, "[c]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). When read in its entirety, MCL 600.1641(2) directs that venue in cases alleging more than one cause of action shall be determined under the rules applicable to tort actions set forth in MCL 600.1629 if "1 of the causes of action is based on *tort or* another legal theory seeking damages for personal injury, property damage, or wrongful death . . . ." (Emphasis added.) This Court's interpretation in *Provider Creditors Comm* failed to accord any significance to the word "tort," thus rendering it nugatory. This Court also, in effect, interpreted the word "or" to mean "and." Because the words "or" and "and" are not interchangeable, courts should accord them their strict meanings if doing so does not give the text a dubious meaning and there is no clear contrary legislative intent. *Amerisure Ins Co v Plumb*, 282 Mich App 417, 428-429; 766 NW2d 878 (2009). Interpreting the word "or" in the disjunctive does not give the statutory language a dubious meaning, and no clear contrary

legislative intent exists. Thus, pursuant to MCL 600.1641(2), MCL 600.1629 is applicable if one of the causes of action alleged is based on tort *or* on "another legal theory seeking damages for personal injury, property damage, or wrongful death . . . ."

Further, the phrase "personal injury, property damage, or wrongful death" modifies only the clause "another legal theory seeking damages" and does not modify the word "tort." "The 'last antecedent' rule of statutory construction provides that a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation." *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Managers, LLC*, 282 Mich App 410, 414; 766 NW2d 874 (2009). Following this rule, the phrase "personal injury, property damage, or wrongful death" modifies only the immediately preceding clause: "or another legal theory seeking damages." Nothing in the statute indicates that the Legislature intended a different interpretation. Accordingly, MCL 600.1629 is applicable if one of the causes of action alleged is based on tort or on another legal theory that seeks damages for personal injury, property damage, or wrongful death. Under the "last antecedent" rule, it is not necessary that a cause of action based on tort seek damages for property damage, wrongful death, or "personal injury" as that term is defined in *Provider Creditors Comm*.[3]

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[3] In *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 323; 661 NW2d 248 (2003), this Court interpreted the same language in different statutory contexts in an identical manner. In that case, this Court addressed whether comparative negligence provisions were applicable to the plaintiffs' action. This Court recognized that "MCL 600.2957 and MCL 600.6304 apply the comparative-negligence allocation of fault to 'an action based on tort or another legal theory seeking damages for personal

Applying our interpretation of MCL 600.1641(2) in this case, we conclude that the trial court correctly determined that venue is proper in Macomb County pursuant to MCL 600.1629(1)(b)(*i*). Because plaintiff alleged several causes of action based on tort, and it is not necessary that any of his claims seek damages for property damage, wrongful death, or personal injury,[4] MCL 600.1641(2) is applicable and directs that venue be determined under the rules applicable to tort actions provided in MCL 600.1629. MCL 600.1692(1) states, in relevant part:

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injury, property damage, or wrongful death . . . .' " This Court concluded that the comparative-negligence rule was not applicable solely to actions for personal injury, property damage, and wrongful death. *Id*. This Court stated:

> This interpretation is in keeping with the general rules of statutory interpretation, which direct that, generally, a modifying clause will be construed to modify only the last antecedent, unless a contrary intent is indicated. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). Thus, the phrase, "personal injury, property damage, or wrongful death" modifies only the phrase "or another legal theory seeking damages." [*Id*. at n 4.]

We note that our interpretation is also consistent with *Dimmitt & Owens*, 481 Mich at 620, 623, 625, in which our Supreme Court operated under the assumption that MCL 600.1629 governed venue when the plaintiffs alleged several causes of action, including several tort claims that did not seek damages for personal injury, property damage, or wrongful death. In that case, the issue presented was how to determine where the "original injury" occurred within the meaning of MCL 600.1629(1)(a) and (b). *Id*. at 620.

[4] Although plaintiff alleged intentional infliction of emotional distress, that claim did not seek damages for personal injury as this Court interpreted that phrase in *Provider Creditors Comm*. This Court opined that "personal injury" means " 'bodily harm, sickness, disease, death, or emotional harm *resulting from bodily harm*.' " *Provider Creditors Comm*, 275 Mich App at 96, quoting MCL 600.6301(b) (emphasis added). Because plaintiff did not suffer bodily harm, he did not suffer a personal injury under that definition of the term. We express no opinion regarding the interpretation of "personal injury" in *Provider Creditors Comm* because it is not relevant to our ultimate conclusion in this case.

> Subject to subsection (2),[5] in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, all of the following apply:
>
> (a) The county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:
>
> (*i*) The defendant resides, has a place of business, or conducts business in that county.
>
> (*ii*) The corporate registered office of a defendant is located in that county.
>
> (b) If a county does not satisfy the criteria under subdivision (a), the county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:
>
> (*i*) The plaintiff resides, has a place of business, or conducts business in that county.

Plaintiff concedes that the original injury in this case occurred in Macomb County. MCL 600.1629(1)(a)(*i*) is inapplicable because that provision refers to "[t]he defendant" and this case involves multiple defendants. In *Massey v Mandell*, 462 Mich 375, 382; 614 NW2d 70 (2000), our Supreme Court interpreted MCL 600.1629(1)(a)(*i*), holding that the provision is inapplicable in cases involving more than one defendant. Likewise, MCL 600.1629(1)(a)(*ii*) is inapplicable in this case because none of the defendants is a corporation with its registered corporate office in Macomb County. As stated in *Massey*, under MCL 600.1629(1)(a)(*ii*), "venue would be required to be in the county where the original injury occurred if a defendant is a corporation and its registered corporate office is in the same

[5] Subsection (2) states that "[a]ny party may file a motion to change venue based on hardship or inconvenience." MCL 600.1629(2). It is undisputed that this subsection is inapplicable in this case.

county." *Id*. at 383. In this case, although Oak Hill II is based in Macomb County, it is a limited partnership rather than a corporation. Thus, MCL 600.1629(1)(a)(*ii*) is inapplicable.

Because neither MCL 600.1629(1)(a)(*i*) nor MCL 600.1629(1)(a)(*ii*) is applicable, we must proceed to MCL 600.1629(1)(b), as that provision directs. Plaintiff concedes that he resides in Macomb County. Accordingly, because the original injury occurred in Macomb County and plaintiff resides in that county, venue is proper in Macomb County pursuant to MCL 600.1629(1)(b)(*i*). Plaintiff argues that MCL 600.1629(1)(b)(*i*) does not apply because the provision refers to "the" plaintiff, and plaintiff brought this action as a class action on behalf of himself and all others similarly situated. It is undisputed, however, that plaintiff failed to define the purported class or move for certification of the class as required by MCR 3.501(B)(1).[6] Moreover, the record fails to identify any members of the purported class, and plaintiff has made no showing that there existed

[6] MCR 3.501(B) provides, in relevant part:

> (B) Procedure for Certification of Class Action.
>
> (1) *Motion*.
>
> (a) Within 91 days after the filing of a complaint that includes class action allegations, the plaintiff must move for certification that the action may be maintained as a class action.
>
> (b) The time for filing the motion may be extended by order on stipulation of the parties or on motion for cause shown.
>
> (2) *Effect of Failure to File Motion*. If the plaintiff fails to file a certification motion within the time allowed by subrule (B)(1), the defendant may file a notice of the failure. On the filing of such a notice, the class action allegations are deemed stricken, and the action continues by or against the named parties alone. The class action allegations may be reinstated only if the plaintiff shows that the failure was due to excusable neglect.

any class members.[7] Because plaintiff has failed to offer any support for the validity of his class-action approach, for purposes of venue we can only consider his individual claims. Thus, contrary to plaintiff's argument, this action involves only one plaintiff, and MCL 600.1629(1)(b)(*i*) is applicable. Therefore, if we were not bound by MCR 7.215(J)(1) to follow the rule of law articulated in *Provider Creditors Comm*, we would affirm the trial court's order on the basis that venue is proper in Macomb County under MCL 600.1629(1)(b)(*i*).

Following the rule of law in *Provider Creditors Comm*, as required under MCR 7.215(J)(1), we are constrained to reverse the trial court's decision and hold that venue is proper in Oakland County, where plaintiff filed this action. Because plaintiff does not seek damages for property damage, wrongful death, or "personal injury" as that term was interpreted in *Provider Creditors Comm*, we must conclude that MCL 600.1641(2) does not control venue in this case. See *Provider Creditors Comm*, 275 Mich App at 95-96.

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[7] MCR 3.501(A)(1) sets forth the following prerequisites to maintain an action as a class action:

> (a) the class is so numerous that joinder of all members is impracticable;
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> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
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> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

Accordingly, we must look to MCL 600.1641(1), the counterpart to MCL 600.1641(2), to determine venue. MCL 600.1641(1) states:

> Except as provided in subsection (2), if causes of action are joined, whether properly or not, *venue is proper in any county in which either cause of action, if sued upon separately, could have been commenced and tried*, subject to separation and change as provided by court rule. [Emphasis added.]

Thus, venue is proper in any county in which any of plaintiff's causes of action could have been brought if they had been brought separately. Plaintiff correctly argues that venue is proper in Oakland County pursuant to MCL 600.1621(a). MCL 600.1621 provides in full:

> Except for actions provided for in [MCL 600.1605, 600.1611, 600.1615, and 600.1629],[8] venue is determined as follows:
>
> (a) The county in which a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located, is a proper county in which to commence and try an action.
>
> (b) If none of the defendants meet 1 or more of the criteria in subdivision (a), the county in which a plaintiff resides or has a place of business, or in which the registered office of a plaintiff corporation is located, is a proper county in which to commence and try an action.
>
> (c) An action against a fiduciary appointed by court order shall be commenced in the county in which the fiduciary was appointed.

It is undisputed that defendant Albrough resides in Oakland County. Thus, venue is proper in Oakland

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[8] It is undisputed that MCL 600.1605, MCL 600.1611, and MCL 600.1615 are inapplicable. We also must conclude that MCL 600.1629 is inapplicable as discussed in *Provider Creditors Comm*, 275 Mich App at 95-96.

County pursuant to MCL 600.1621(a). Accordingly, following *Provider Creditors Comm*, we must conclude that the trial court erred by granting defendants' motion to change venue to Macomb County.

IV. CONCLUSION

Although the trial court correctly determined that venue is proper in Macomb County pursuant to MCL 600.1629(1)(b)(*i*), we are constrained to conclude, on the basis of *Provider Creditors Comm*, that the trial court erred by granting defendants' motion to change venue from Oakland County. We follow the rule of law in *Provider Creditors Comm* only because we are required to do so pursuant to MCR 7.215(J)(1). For the reasons discussed in this opinion, we call for the convening of a special panel of this Court in accordance with MCR 7.215(J)(3).

Reversed and remanded for further proceedings. We do not retain jurisdiction.

FORT HOOD, P.J., and K. F. KELLY, J., concurred with DONOFRIO, J.

PEOPLE v MARSHALL

Docket No. 297115. Submitted September 6, 2012, at Detroit. Decided October 4, 2012. Approved for publication November 29, 2012, at 9:05 a.m. Vacated in part, 493 Mich 1020.

Dustin A. Marshall was convicted by a jury in the Jackson Circuit Court, Chad C. Schmucker, J., of assault with intent to commit murder, possession of a firearm by a felon, and possession of a firearm during the commission of a felony and was sentence as a fourth-offense habitual offender. Defendant appealed. In an unpublished order entered October 22, 2010 (Docket No. 297115),the Court of Appeals, while retaining jurisdiction, remanded the matter to the trial court for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), regarding defendant's claim that he received ineffective assistance of counsel. Following that hearing, the trial court, Thomas D. Wilson, J., denied defendant's motion for a new trial.

The Court of Appeals *held*:

1. The trial court did not err by determining that defense counsel was not ineffective as a result of his choice of defense strategies. Following the *Ginther* hearing, the trial court found that defense counsel's account of his pretrial discussions with defendant was credible, and that determination was entitled to deference.

2. Defendant did not show that defense counsel's failure to introduce certain photographs allegedly depicting a bush that might have obscured the witnesses' view of the crime scene fell below an objective standard of reasonableness or that there is a reasonable probability that the result of the trial would have been different if the photographs had been introduced. Defendant failed to establish this claim of ineffective assistance of counsel.

3. Defendant failed to demonstrate that he was prejudiced by his counsel's failure to file a motion to suppress a photograph of defendant wearing clothing matching the description of the shooter's clothing. The camera that contained the photograph was discovered during the execution of a search warrant at the place where defendant was staying that authorized the seizure of any and all evidence relating to the shooting of the victim. The camera

contained evidence linking defendant to the offense and was within the scope of the warrant.

4. Defense counsel's failure to file a motion in limine to exclude evidence of defendant's prior convictions for impeachment purposes was not ineffective assistance of counsel because defendant did not testify or plan to testify and therefore the motion was unnecessary.

5. The victim's bloody clothing was relevant evidence because it showed bullet holes indicating the number of shots that were allegedly fired, the location of the wounds, and the amount of blood lost by the victim. The evidence was probative of the circumstances surrounding the victim's injuries and the shooter's intent during the assault. The presence of the blood on the clothing was not so shocking or gruesome that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice under MRE 403. Because the evidence was admissible, defense counsel was not ineffective as a result of his failure to object to its admission.

6. Evidence that shell casings recovered from the crime scene matched the caliber and brand of ammunition found during the execution of the search warrant at the place where defendant was staying was relevant to connect defendant to the shooting and the gun used in the shooting. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Defense counsel was not ineffective as a result of failing to object to the admissible evidence regarding the bullets. Further, because the clothing and bullets were properly admitted, the prosecutor was free to comment with regard to the evidence and defense counsel was not ineffective because he failed to object to the prosecutor's statements.

7. Defense counsel's failure to introduce into evidence a laboratory report that was not exculpatory and had no tendency to eliminate defendant as the shooter or identify someone else as the shooter was not objectively unreasonable. There was no reasonable probability that the result of the proceeding would have been different had the report been presented. In sum, defendant was not denied effective assistance of counsel. The trial court did not abuse its discretion by denying defendant's motion for a new trial based on ineffective assistance of counsel.

8. Because the trial court was familiar with the facts of the case and the legal standards for evaluating an attorney's performance relative to a claim of ineffective assistance of counsel, its decision to deny defendant's request to present an attorney at the *Ginter* hearing as an expert witness regarding whether defense

counsel's performance adhered to community standards and norms was within the range of reasonable and principled outcomes and not an abuse of discretion.

9. It was not improper for the prosecutor to comment on matters affecting the credibility of the witnesses and possible influences on their testimony when arguing that their identification of defendant as the shooter should be believed. A prosecutor may argue from the facts that witnesses are worthy or not worthy of belief. Defendant failed to show plain error in this regard.

10. Defendant failed to show that plain error occurred affecting his substantial rights when the prosecutor introduced evidence that children lived in the area where the shooting occurred to support an argument that defendant's conduct of firing shots in a residential area showed that he acted with the intent to kill. A jury may infer the intent to kill from all the facts and circumstances, including the use of a deadly weapon. A prosecutor is not required to use only the least prejudicial evidence to establish facts at issue.

11. A prosecuting attorney seeking to enhance the sentence of a criminal defendant because of the defendant's status as an habitual offender must, pursuant to MCL 769.13(1), file a written notice of the intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense; the date of the bindover from the district court to the circuit court is not one of the specified dates for measuring the timeliness of the notice. Because it is undisputed that defendant was never arraigned on the underlying offense in the circuit court, the period for filing the habitual-offender sentence enhancement notice was properly measured from the date the information charging the underlying offense was filed. In this case, the underlying information, which included an habitual-offender notice, was timely filed.

12. Defendant's prior convictions were established, for habitual-offender sentence-enhancement purposes, by the unchallenged information in the presentence investigation report and defendant's acknowledgment that the prior record variables of the sentencing guidelines, which reflected defendant's prior convictions, were properly scored.

Affirmed.

SENTENCES — HABITUAL OFFENDERS — NOTICE OF INTENT TO ENHANCE SENTENCE — TIMELINESS OF NOTICE.

A prosecuting attorney seeking to enhance the sentence of a criminal defendant because of the defendant's status as an habitual of-

> fender must file a written notice of the intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense; the date of the defendant's bindover from the district court to the circuit court on the underlying offense is not an appropriate date from which to measure the timeliness of the notice (MCL 769.13[1]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Henry C. Zavislak*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

Frank D. Eaman, PLLC (by *Frank D. Eaman*), for defendant.

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM. Defendant appeals as of right his convictions following a jury trial of assault with intent to commit murder, MCL 750.83, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 35 to 60 years for the assault and the felon-in-possession convictions and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant appealed and the Court of Appeals, while retaining jurisdiction, remanded the matter to the trial court for a *Ginther*[1] hearing. Unpublished order of the Court of Appeals, entered October 22, 2010 (Docket No. 297115). We affirm.

Defendant's convictions arose from the nonfatal shooting of Jamaal Hunt during the early morning hours of July 5, 2009, in Jackson, Michigan.

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that he was denied the effective assistance of counsel. Defendant raised this issue in a posttrial motion for a new trial, which the trial court denied. After conducting the *Ginther* hearing, the trial court denied defendant's motion for a new trial. "A claim of ineffective assistance of counsel is a mixed question of law and fact." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). "A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *Id*. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made. *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008).

The right to counsel guaranteed by the United States and Michigan Constitutions is the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness and that it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Effective assistance of counsel is presumed, and a defendant must overcome the presumption that counsel's performance constituted sound trial strategy. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314

(2009); *Jordan*, 275 Mich App at 667-668. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Defendant argues that defense counsel was ineffective as a result of pursuing "a strategy of defense that was chosen by him, not by the defendant, a strategy that was doomed because of his lack of preparation, investigation, and research and because it was a lie." Defendant further argues that counsel was ineffective because he did not investigate a claim of self-defense. "Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). "A substantial defense is one that might have made a difference in the outcome of the trial." *Id*. (quotation marks and citation omitted). Failure to make a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

At the *Ginther* hearing, defendant and defense counsel presented conflicting accounts of their pretrial discussions of the case and possible defense strategies. According to defense counsel, defendant told him that he shot the victim in self-defense during a struggle with the victim over the gun. Counsel, who was retained, testified that he expressed a desire to hire a private investigator and a medical expert to explore the self-defense theory, but defendant did not want to spend any more money and he refused to provide the names of any witnesses or allow counsel to use that defense. Counsel explained that he therefore elected to pursue a strategy of attacking the sufficiency of the evidence and estab-

lishing reasonable doubt. According to counsel, even after he informed defendant that a "reasonable doubt" defense only had a 20 to 30 percent chance of success, defendant was still convinced that he could "beat" the charge because he had been acquitted of a previous shooting using that strategy. Conversely, defendant testified that he told defense counsel that the shooting occurred during a struggle between himself and the victim, but denied telling defense counsel what defense theory to pursue or refusing to allow counsel to pursue a defense of self-defense. According to defendant, defense counsel told him that, in light of the preliminary examination testimony, no one could identify defendant as having been at the scene of the crime, so he "should go with I wasn't there."

An evaluation of defense counsel's performance depends, in part, on which version of these competing accounts was deemed credible. The trial court's determinations indicate that it credited defense counsel's testimony and held that counsel's defense strategy was objectively reasonable. " '[R]egard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.' " *Dendel*, 481 Mich at 130, quoting MCR 2.613(C). The trial court had the opportunity to judge the credibility of defense counsel and defendant and found that defense counsel's account of the events was credible. The court concluded that defense counsel was not ineffective "for failing to investigate a defense that Defendant refused to let him run."

Although defendant's witnesses at the *Ginther* hearing testified in support of a self-defense theory, defense counsel's testimony indicates that he wanted to pursue a self-defense claim but defendant did not want to do so, would not provide the names of witnesses, and would

not permit counsel to hire a private investigator to explore that defense. Crediting defense counsel's testimony that defendant refused to cooperate in presenting a self-defense claim, counsel cannot be faulted for not pursuing that defense. Without defendant's cooperation, it would have been implausible to present that defense at trial. Further, considering the conflicting and widely varied testimony elicited at the preliminary examination and at trial, it was not unreasonable for counsel to pursue a "reasonable doubt" strategy. Indeed, although eyewitness Lasonia Wilks identified defendant as the person involved in the altercation with the victim, the victim himself maintained that defendant was not present at the scene. Accordingly, giving deference to the trial court's finding that defense counsel was credible, we find no error in the trial court's determination that defense counsel was not ineffective as a result of his choice of defense strategies.

Defendant additionally argues that counsel was ineffective because he failed to introduce photographs that could have impeached the credibility of eyewitness testimony. At the *Ginther* hearing, defendant presented three photos taken by his original defense counsel, which allegedly depicted a bush that might have obscured a view of the scene. Although initial defense counsel attached some significance to the photographs, when he attempted to use them to undercut the credibility of an eyewitness at the preliminary examination, his strategy was unsuccessful. The trial court observed the photos and held that they did not clearly demonstrate the existence of a bush and that if any bush were shown to have been present it would not have discredited the testimony of the eyewitnesses to the point of producing a different outcome at trial. The trial court's findings are not clearly erroneous. Thus, defendant has not demonstrated that counsel's failure to introduce the

photographs fell below an objective standard of reasonableness or that there is a reasonable probability that the result of the trial would have been different if the photos had been introduced.

Defendant next argues that defense counsel was ineffective because he failed to move to suppress a photograph of defendant wearing a shirt that matched the description of the shirt worn by the shooter. Defendant argues that the photograph was unlawfully seized because the camera from which it was obtained was not an object within the scope of the search warrant that the police executed at the place where defendant was found. First, we disagree with defendant's contention that the camera was beyond the scope of the search warrant. The warrant broadly authorized the seizure of "any and all evidence related to the shooting of Jamal [sic] Hunt . . . ." A camera containing a photograph of defendant wearing clothing that matched the description of the shooter's clothing was evidence linking defendant to the offense and, therefore, within the scope of the warrant. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Further, defense counsel testified that he did not object to the photo because the shirt that defendant was wearing looked like a common shirt that could be found in many closets. The trial court agreed that even if a motion to suppress had been successful, there was no reasonable probability that the outcome of the trial would have been different if the photograph had been excluded. Thus, defendant has not demonstrated that he was prejudiced by counsel's failure to file a motion to suppress.

Defendant also argues that counsel was ineffective because he failed to file a motion in limine to exclude evidence of defendant's prior convictions for impeach-

ment under MRE 609. However, such a motion would have been necessary only if defendant had planned to testify. According to defense counsel, defendant stated that he did not want to testify because he did not feel comfortable speaking in court and he did not feel that he came across well. Because defendant did not testify and defense counsel's testimony, which the trial court credited, indicates that defendant never planned on testifying, counsel was not ineffective because he failed to file a motion in limine. Counsel was not required to make an unnecessary motion. See *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant next argues that defense counsel was ineffective because he failed to object to the admission of the victim's bloody clothing or evidence that bullets discovered during a search of the place where defendant was found appeared to match the shell casings recovered from the crime scene. Defendant also argues that counsel was ineffective because he failed to object to the prosecutor's references to this evidence during closing argument. Defendant argues that this evidence was irrelevant and unduly prejudicial.[2] We disagree.

"Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

[2] Although defendant challenges the admissibility of this evidence as part of a separate issue on appeal, defense counsel expressly informed the trial court that he had no objection to the admission of the victim's clothing or the box of bullets found where defendant was staying. By affirmatively approving the admission of this evidence, defense counsel waived any error. *People v Carter*, 462 Mich 206, 214-219; 612 NW2d 144 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). A waiver extinguishes any error, leaving no error to review. *Carter*, 462 Mich at 216; *Ortiz*, 249 Mich App at 311. Accordingly, our review is confined to determining whether defense counsel was ineffective because he approved the admission of this evidence.

evidence." MRE 401. All relevant evidence is admissible, except as otherwise provided by law or court rule. MRE 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403.

The victim's clothing was relevant because it showed bullet holes supporting the alleged number of shots that were fired, the location of the victim's wounds, and the degree to which the victim bled. This evidence was probative of the circumstances surrounding the victim's injuries and the shooter's intent during the assault. Moreover, while the presence of blood on the clothing could be considered prejudicial, it was not so shocking or gruesome that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. MRE 403. Because the clothing was admissible, defense counsel was not ineffective as a result of failing to object to its admission. Defense counsel is not required to make a futile objection. *Ericksen*, 288 Mich App at 205.

Likewise, that the shell casings recovered from the crime scene matched the caliber and brand of ammunition found at the location where defendant was staying was relevant to connect defendant to the shooting and show that he was the source of the gun used in the shooting. Moreover, there was no attempt to use the bullets for any purpose other than that for which they were relevant (i.e., to connect defendant to the shooting), so the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. Accordingly, the evidence was admissible and defense counsel was not ineffective because he failed to object to its admission. *Ericksen*, 288 Mich App at 205.

Further, because the victim's clothing and the bullets were properly admitted into evidence, the prosecutor was free to comment on that evidence during closing argument. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). Therefore, defense counsel was not ineffective because he failed to object to the prosecutor's statements. *Ericksen*, 288 Mich App at 205.

Defendant next argues that defense counsel was ineffective as a result of failing to request the introduction of a laboratory report that was produced at the end of the trial. The report indicated that no fingerprints could be found on the shell casings that were recovered from the crime scene. Contrary to what defendant asserts, this evidence was not exculpatory. It had no tendency either to eliminate defendant as the shooter or to identify someone else as the shooter. We agree with the trial court's statement that the laboratory report "added nothing to the case" because it was "inconclusive as to identity." Because the evidence had no exculpatory value, defendant has not demonstrated that counsel's failure to introduce the report was objectively unreasonable or that there is a reasonable probability that the result of the proceeding would have been different had the report been presented.

In sum, defendant has not demonstrated that he was denied the effective assistance of counsel. We reject most of defendant's claims as a result of his failure to show that counsel's performance fell below an objective standard of reasonableness. To the extent that counsel made some errors, defendant has not demonstrated a reasonable probability that those errors, whether considered singularly or cumulatively, affected the outcome of trial. *Jordan*, 275 Mich App at 667; *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). Accordingly, the trial court did not abuse its

discretion by denying defendant's motion for a new trial with respect to this issue. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

Defendant also vaguely challenges the trial court's decision denying his request to present an attorney as an expert witness at the *Ginther* hearing to testify regarding whether defense counsel's performance adhered to community standards and norms. We review for an abuse of discretion the trial court's decision to exclude this testimony. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). An abuse of discretion occurs when a trial court selects an outcome that does not fall within the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). Expert testimony is admissible under MRE 702 if the trial court determines that "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." In this case, the testimony was offered at a hearing at which the trial court acted as the trier of fact. The court found that the proposed testimony would not be helpful because it was "well aware of the community standards on this issue." The trial court appropriately evaluated the admissibility of the proposed testimony under MRE 702. Because the court was familiar with the facts of the case and the legal standards for evaluating an attorney's performance relative to a claim of ineffective assistance of counsel, its decision to exclude defendant's proposed expert testimony was within the range of reasonable and principled outcomes and, therefore, was not an abuse of discretion.

II. THE PROSECUTOR'S CONDUCT

Defendant next argues that the prosecutor engaged in misconduct when he argued that the number of

people present in the court was somehow intimidating the witnesses and when he elicited testimony that children were living on the block where the shooting occurred and then used that fact to argue intent. Because defendant did not object to either instance of alleged misconduct, these claims of error are unpreserved. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *Id*.

Prosecutors are accorded great latitude regarding their arguments and are free to argue the evidence and all reasonable inferences from the evidence as they relate to their theory of the case. *Seals*, 285 Mich App at 22. A prosecutor may argue from the facts that witnesses are worthy or not worthy of belief. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007); *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). This is especially relevant when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes. *Id*. Considered in context, the prosecutor's arguments addressed matters relating to the weight and credibility of the witnesses' testimony. The prosecutor commented on the facts that the eyewitnesses' testimony was equivocal and their accounts and recollection of the events varied between the times of their initial interviews with the police, the preliminary examination, and the trial. The prosecutor offered reasons for the equivocation, including that the witnesses were required to testify in the presence of a large number of people, which was a matter of record. It was not improper for the prosecutor to comment on matters affecting the credibility of the witnesses and possible influences on their testimony to argue that their identification of defendant as the shooter should be believed, as opposed

to other times when they did not identify defendant as the shooter. Defendant has not demonstrated a plain error with respect to this unpreserved claim of misconduct.

We also reject defendant's argument that the prosecutor improperly elicited evidence that children lived in the neighborhood and then improperly commented on that evidence when arguing that continuing to shoot at the victim "in a residential area where the homes are near each other and where kids reside, only underscores the fact that . . . defendant . . . intended to kill [the victim]." "[M]inimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). "A factfinder can infer a defendant's intent from his words or from the act, means, or the manner employed to commit the offense." *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). A jury may infer the intent to kill on the basis of all the facts and circumstances, including the use of a dangerous weapon. See *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997). "There is no rule requiring the prosecution to use only the least prejudicial evidence per se to establish facts at issue." *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). "The prosecution has wide latitude in arguing the facts and reasonable inferences, and need not confine argument to the blandest possible terms." *Dobek*, 274 Mich App at 66.

The prosecutor introduced evidence that children lived in the area where the shooting occurred and that defendant fired shots in the vicinity of people who were gathered. The prosecutor was free to comment on this evidence, and reasonable inferences arising therefrom, to support an argument that defendant's conduct of

firing shots in a residential area showed that he acted with an intent to kill. The strength of that inference was a matter for the jury to decide. Although the fact that children lived close to the scene of the shooting may have aroused sympathy, the jury was instructed that it must not let sympathy influence its decision. Because the prosecutor's argument was not improper and the trial court's instruction was sufficient to protect defendant's substantial rights, defendant has not demonstrated a plain error affecting his substantial rights.

III. ISSUES INVOLVING THE JURY

Defendant raises two issues relating to the trial court's handling of matters involving the jury. Defendant first complains that no record was made of various juror notes or communications between the court and the jury and that prejudice must be presumed in the absence of a record.

"For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). One purpose of appellate-preservation requirements is to "create a record of the error and its prejudice." *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997). Defendant did not raise this issue below, either at trial or in an appropriate posttrial motion. Although the juror notes are a matter of record (they are included in the lower court file), there is no indication in the record that the notes were ever conveyed to the trial court or that any off-the-record communications between the court and the jury ever occurred. Because defendant did not raise this issue below, no record establishing that these alleged events actually occurred was ever created.

Thus, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011).

The lower court file contains four handwritten notes stapled to the verdict form. The notes appear to be juror notes, questions, and requests. The notes state:

> [Note 1] Body mike
> dash camera
> hospital dashcam
> 911 call
>
> [Note 2] Could we back it up to the door knock?
>
> [Note 3] Could we see the video of Dr. [Rami] Khoury?
>
> [Note 4] We would like to watch the videotape of Ofc. [Steven] Scarpino after lunch[.]

As previously indicated, while the notes themselves are a matter of record, there is no indication in the record that the jury ever conveyed these notes to the trial court or that there were any communications between the court and the jury concerning the notes.

On appeal, defendant relies on MCR 6.414(B), which, at the time of trial and before its repeal effective September 1, 2011, provided, in pertinent part:

> The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record.

But because there is no indication that the trial court communicated with the jury or with any juror and defendant has not otherwise established factual support for his belief that any off-the-record communications occurred, defendant has not demonstrated a violation of MCR 6.414(B).

Although defendant also argues that prejudice must be presumed from the absence of a record, the authority he cites, *Valentine v United States*, 488 F3d 325, 334-335 (CA 6, 2007), only holds that a court's communications with a deliberating jury in the absence of counsel may be a critical stage of the trial at which a presumption of prejudice may attach. *Valentine* does not state that a presumption of prejudice arises from the absence of a record. Moreover, the court in *Valentine* recognized that not all communications between a court and a jury involve a critical stage of the trial at which counsel is required to prevent a presumption of prejudice from arising. *Id.* at 335. This is consistent with our Supreme Court's decision in *People v France*, 436 Mich 138; 461 NW2d 621 (1990), which defendant also cites.

In *France*, the Supreme Court explained that communications with a deliberating jury may be classified into three categories: substantive, administrative, or housekeeping. *Id.* at 142-143. The Court stated that substantive communications, which encompass supplemental instruction on the law, carry a presumption of prejudice, even in the absence of an objection. *Id.* at 143. Conversely, administrative communications, which include instructions regarding the availability of certain pieces of evidence, carry no presumption of prejudice and a party's failure to object when made aware of the communication "will be taken as evidence that the administrative instruction was not prejudicial." *Id.*

An examination of the juror notes in this case reveals that each refers to an evidentiary matter. None can be characterized as substantive or inviting a substantive communication. Indeed, defendant acknowledges in his brief that "the requests from the jurors appear to be administrative, not substantive." This acknowledgement weighs against defendant's claim that he is en-

titled to a presumption of prejudice. More importantly, as explained previously, defendant has not established that any off-the-record communications actually occurred in this case. Accordingly, defendant has not demonstrated a plain error affecting his substantial rights with respect to this unpreserved issue.

Defendant also argues that reversal is required because the trial court failed to conduct an evidentiary hearing to determine the effect of the jurors' exposure to extraneous comments. The record discloses that the trial court addressed this matter on the record after being informed that some spectators might have yelled something in a hallway where some jurors were present. The trial court determined that the comments were made by spectators associated with a different trial and did not involve a "tampering issue" or "threatening a juror." Therefore, nothing further needed to be done. Although defendant now argues that the trial court should have held a hearing to determine whether the jurors' exposure to the extraneous comments affected their ability to be fair and impartial, defense counsel affirmatively approved the trial court's handling of the situation at trial. Therefore, counsel waived any error. *People v Carter*, 462 Mich 206, 214-219; 612 NW2d 144 (2000). A waiver extinguishes any error. *Id.* at 216. Accordingly, there is no error to review.

IV. SENTENCING AS AN HABITUAL OFFENDER

Lastly, defendant argues that he was improperly sentenced as a fourth-offense habitual offender. Defendant's argument presents two distinct questions: (1) whether the habitual-offender notice was timely filed and (2) whether the prior convictions listed in the habitual-offender notice were properly established. Because defendant never challenged the habitual-offender notice in the trial court and never challenged the accuracy or constitutional validity of

the prior convictions listed in the habitual-offender notice, these issues are unpreserved. Accordingly, we review these issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MCL 769.12 provides that a person who has been previously convicted of three or more felonies shall be subject to an enhanced sentence if convicted of a subsequent felony. The procedure for seeking sentence enhancement is prescribed in MCL 769.13, which provides, in pertinent part:

> (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under [MCL 769.10, MCL 769.11, or MCL 769.12], by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.
>
> * * *
>
> (4) A defendant who has been given notice that the prosecuting attorney will seek to enhance his or her sentence as provided under [MCL 769.10, MCL 769.11, or MCL 769.12], may challenge the accuracy or constitutional validity of 1 or more of the prior convictions listed in the notice by filing a written motion with the court and by serving a copy of the motion upon the prosecuting attorney in accordance with rules of the supreme court.
>
> (5) The existence of the defendant's prior conviction or convictions shall be determined by the court, without a jury, at sentencing, or at a separate hearing scheduled for that purpose before sentencing. The existence of a prior conviction may be established by any evidence that is relevant for that purpose, including, but not limited to, 1 or more of the following:
>
> * * *

(d) Information contained in a presentence report.

(e) A statement of the defendant.

Defendant argues that the habitual-offender notice was not timely filed because it was filed more than 21 days after the district court bound the defendant over to the circuit court, which occurred on September 23, 2009. However, the date of the bindover to circuit court is not one of the specified dates for measuring the timeliness of an habitual-offender notice. MCL 769.13(1) sets forth two dates for measuring the timeliness of that notice: (1) "21 days after the defendant's arraignment on the information charging the underlying offense" or (2) "if arraignment is waived, within 21 days after the filing of the information charging the underlying offense." Defendant argues that neither of these events occurred because he was never arraigned in the circuit court and he never formally waived arraignment. But if that were the case, then the statutory period for filing an habitual-offender notice was never actually triggered and the notice could not be considered untimely. Because it is undisputed that defendant was never arraigned on the underlying offense in the circuit court, the first period is not applicable. MCL 769.13(1) clearly contemplates that in the absence of an arraignment, the period for filing the habitual-offender notice is to be measured from the date the information charging the underlying offense is filed. In this case, the information charging the underlying offense, which was filed on November 2, 2009, included the habitual-offender notice. Therefore, we reject defendant's argument that the notice was not timely filed.

Defendant also argues that he was improperly sentenced as an habitual offender because his prior convictions were never properly established. Defendant never

challenged the accuracy or validity of his prior convictions in a motion pursuant to MCL 769.13(4). And even when a conviction is challenged, MCL 769.13(5)(d) and (e) permit the existence of the conviction to be established by information in a presentence investigation report or a statement of the defendant. Defendant's presentence investigation report includes each of the three convictions identified in the habitual-offender notice. Defense counsel informed the court at sentencing that he had reviewed the presentence investigation report with defendant and that there were no objections to the report. Further, the conviction information section of the sentencing information report listed "4th or subsequent" in the space for habitual-offender information and listed a score of 30 points for prior record variable 2, indicating that defendant has four or more prior, low-severity felony convictions. MCL 777.52(1)(a). At sentencing, defense counsel agreed with the total score of 70 points for the prior record variables. Under these circumstances, defendant has not demonstrated a plain error. The prior convictions were established by the unchallenged information in the presentence investigation report and defendant's acknowledgment that the prior record variables, which reflected defendant's prior convictions, were properly scored.

Affirmed.

SERVITTO, P.J., and FITZGERALD and TALBOT, JJ., concurred.

CARON v CRANBROOK EDUCATIONAL COMMUNITY

Docket No. 305486. Submitted September 12, 2012, at Detroit. Decided October 4, 2012. Approved for publication November 29, 2012, at 9:10 a.m.

Katie Martineau Caron and Kevin Caron brought an action in the Oakland Circuit Court against Cranbrook Educational Community, the Christman Company, David W. Osler, David W. Osler Associates, Rafael Moneo, and Moneo Brock Studio, LLC, after Katie Caron, an art instructor at Cranbrook, was injured when a portable room partition that served as a wall of her classroom fell on her when she attempted to move it. The court, Phyllis C. McMillen, J., granted Cranbrook's motion for summary disposition on the ground that plaintiffs' action was barred by the exclusive-remedy provision of the Worker's Disability Compensation Act, MCL 418.131(1). Plaintiffs did not appeal this order. The court also granted the motions of Christman, the Osler defendants, and the Moneo defendants in three separate orders, ruling that plaintiffs' cause of action against them was time-barred by MCL 600.5839, which prevents a person from maintaining an action against a state-licensed architect, professional engineer, or contractor for bodily injury arising out of the defective or unsafe condition of an improvement to real property more than six years after the improvement was occupied, used, or accepted. Plaintiffs appealed these three orders.

The Court of Appeals *held*:

1. The court properly granted summary disposition because, although the room partition that caused the injury was fully portable, it nevertheless constituted an improvement to real property under MCL 600.5839; therefore, that provision time-barred plaintiffs' action. MCL 600.5839 provides that a person may not maintain an action to recover damages for bodily injury arising out of the defective or unsafe condition of an improvement to real property against any state-licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, unless the action is commenced within six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement. The portable room parti-

tion that caused the injuries was installed in 2002, and the accident giving rise to the action occurred in June 2009. To determine whether the portable room partition constituted an improvement to real property, it was necessary to consider (1) the general nature of the portable room partition, (2) whether the portable room partition was an integral component or essential to the operation of the art classroom addition; (3) whether the purchase, placement, and utilization of the portable room partition required the expenditure of labor and money and increased the usefulness of, added value to, bettered, or enhanced the capital value of the art classroom addition in relationship to the structure's intended use and purpose; and (4) the permanence of the portable room partition, taking into consideration whether it was affixed, bolted, mounted, or otherwise physically annexed to the art classroom addition and whether its placement has been or was intended to be longstanding or for an indefinite period, remembering that permanent does not mean eternal and that the ability to remove an object without damaging realty does not preclude a finding of permanence. The portable room partition was intended and installed to serve as a wall, required an expenditure of labor and money, increased the usefulness of the art classroom addition by providing space and flexibility for art classes and studio projects, and, although fully portable, was substantial, custom-designed, and intended to be permanent. Accordingly, the portable room partition was constructively annexed to the art classroom addition and properly considered an improvement to real property under MCL 600.5839.

2. The trial court did not err by granting summary disposition before discovery was complete with regard to whether the portable room partition increased the value of the art classroom addition. It was reasonable to infer that the portable room partition increased the value of the art classroom addition because of its nature and characteristics, its purchase and installation costs, and the benefits of using it to create and adjust instructional and studio space. Summary disposition may be proper before discovery is complete if further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion. The party opposing a summary-disposition motion because discovery is not complete must provide some evidence that a factual dispute exists. Plaintiffs failed to identify any prospective evidence that the portable room partition added no capital value, and there was no fair chance that any such evidence existed.

Affirmed.

LIMITATION OF ACTIONS — NEGLIGENCE — ARCHITECTS — ENGINEERS — BUILDING CONTRACTORS — IMPROVEMENTS TO REAL PROPERTY.

MCL 600.5839 provides that a person may not maintain an action to recover damages for bodily injury arising out of the defective or unsafe condition of an improvement to real property against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, unless the action is commenced within six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement; the following factors should be examined in determining whether an addition constitutes an improvement to real property: (1) the general nature of the addition, (2) whether the addition is an integral component or essential to the operation of the property, (3) whether the purchase, placement, and utilization of the addition required the expenditure of labor and money and increased the usefulness of, added value to, bettered, or enhanced the capital value of the property in relationship to the property's intended use and purpose, and (4) the permanence of the addition, taking into consideration whether it was affixed, bolted, mounted, or otherwise physically annexed to the property and whether its placement has been, or was intended to be, longstanding or for an indefinite period; the fact that an addition may be removed without damaging the property does not preclude a finding of permanence.

Donald M. Fulkerson for Katie Martineau Caron and Kevin Caron.

Harvey Kruse, P.C. (by *Larry W. Davidson* and *Stephanie Marino Anderson*), for the Christman Company.

Plunkett Cooney (by *Jeffrey C. Gerish* and *Scott H. Sirich*) for David W. Osler, David W. Osler Associates, Inc., Rafael Moneo, and Moneo Brock Studio, L.L.C.

Before: MURPHY, C.J., and MARKEY and WHITBECK, JJ.

MURPHY, C.J. Plaintiffs Katie Martineau Caron and Kevin Caron appeal as of right the trial court's orders granting summary disposition in favor of defendants

The Christman Company; David Osler and David Osler Associates, Inc. (collectively "Osler"); and Rafael Moneo and Moneo Brock Studio, L.L.C. (collectively "Moneo"). We affirm.

On June 22, 2009, plaintiff Katie Martineau Caron (hereafter "Caron") suffered serious injuries when a T-shaped, three-part portable room partition (PRP) fell on her as she and a graduate student attempted to move the PRP on its casters (wheels) in order to expand the space in which Caron, an art instructor, was going to teach a ceramics class at the Cranbrook Academy of Art. At the time, Caron was employed by defendant Cranbrook Educational Community (Cranbrook). The incident occurred in an "art classroom addition" that had been constructed as part of a larger construction project at the academy known as the New Studios Building project, which was completed in the fall of 2002. Allegedly, Christman designed, manufactured, and sold the PRP itself as well as other PRPs used in the art classroom addition.[1] Moneo and Osler provided architectural design services in connection with the construction project, and the designs included and incorporated the placement and utilization of numerous PRPs. The PRPs are used, as envisioned, to satisfy Cranbrook's ever-changing needs regarding the number, size, and shape of individual rooms employed for art instruction and studio work within the art classroom addition, which itself is a structure containing a large area of open space bordered by standard immovable walls (the parties refer to these walls as the "architectural" walls).

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[1] We note that defendants contend, as supported by affidavits, that Christman was simply the general contractor on the construction project. Defendants maintain that subcontractor Wally Kosorki & Co, Inc., actually constructed the PRPs, and there is a work-change order in the record signed by Christman and Cranbrook that refers to the installation of PRPs by Kosorki. Ultimately, Christman's status is irrelevant to resolution of this appeal.

In April 2010, plaintiffs filed a 19-count complaint against Cranbrook, Christman, Osler, and Moneo, alleging various causes of action arising out of the design, construction, sale, and architectural use and incorporation of the PRP and the incident in which the PRP fell on Caron. The claims by plaintiff Kevin Caron were based on loss of services, society, companionship, and consortium in relationship to his injured wife. Cranbrook filed a motion for summary disposition, arguing that plaintiffs' action was barred by the exclusive-remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131(1). The trial court granted Cranbrook's motion, and plaintiffs have not appealed that order. Over time, defendants Christman, Osler, and Moneo filed separate motions for summary disposition under MCR 2.116(C)(7) and (10), each arguing that MCL 600.5839 barred plaintiffs' lawsuit. The crux of this case and appeal is whether the PRP that fell on Caron constituted "an improvement to real property" under MCL 600.5839, which provides in relevant part:

> (1) A person shall not maintain an action to recover damages for injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective or unsafe condition of an improvement to real property, or an action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, unless the action is commenced within either of the following periods:
>
> (a) Six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

Plaintiffs do not contest that MCL 600.5839 generally applies to defendants, considering their profes-

sional fields, nor do plaintiffs dispute that installation of the PRPs was completed in the fall of 2002. Given that the accident occurred in June 2009, which, in light of plaintiffs' concession, is more than "[s]ix years after the time of occupancy of the completed improvement, use, or acceptance of the improvement," MCL 600.5839(1)(a), the statute would bar plaintiffs' lawsuit if the PRP constituted "an improvement to real property."

At the summary disposition hearing, defendants maintained that the PRP, or its installation, constituted an improvement to real property, thereby implicating the statute, and plaintiffs argued to the contrary, focusing on the contention that the PRP was not affixed or annexed to the realty. The trial court found that the PRPs are "substantial" and were "part and parcel" of the art classroom addition and studio construction project completed in 2002. The court ruled that the PRPs "were a capital improvement to the property such that they qualif[ied] under [MCL 600.5839] . . . ." In three separate orders, the trial court granted defendants' motions for summary disposition under MCR 2.116(C)(7).[2] Plaintiffs appeal as of right.

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[2] We note that subsection (1)(b) of MCL 600.5839 provides that an action, under certain enumerated circumstances, can also be commenced within the following period:

> If the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of *gross negligence* on the part of the contractor or licensed architect or professional engineer, 1 year after the defect is discovered or should have been discovered. However, an action to which this subdivision applies shall not be maintained more than *10 years* after the time of occupancy of the completed improvement, use, or acceptance of the improvement. [Emphasis added.]

Plaintiffs' action was filed less than one year after the incident and within 10 years of completion of the art classroom addition; therefore, the action would have been timely if gross negligence was involved, assuming

This Court reviews de novo a trial court's decision on a motion for summary disposition, a determination that an action is time-barred, and questions of statutory construction. *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 40; 709 NW2d 589 (2006); *Pitsch v ESE Mich, Inc*, 233 Mich App 578, 600; 593 NW2d 565 (1999). MCL 600.5839 serves as a statute of repose and as a statute of limitations that can result in an action's being time-barred. *Ostroth*, 474 Mich at 38-39. Summary disposition is proper when a "claim is barred because of . . . [a] statute of limitations . . . ." MCR 2.116(C)(7). In *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008), this Court, addressing a motion brought pursuant to MCR 2.116(C)(7), observed:

> Under MCR 2.116(C)(7) . . . , this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [Citations omitted.]

This appeal concerns the construction and applicability of MCL 600.5839, and in *McCormick v Carrier*, 487 Mich 180, 191-192; 795 NW2d 517 (2010), our Supreme Court recited the governing principles regarding the interpretation of a statute:

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satisfaction with the one-year discovery provision. The trial court gave plaintiffs seven days to amend their complaint to add allegations of gross negligence. Plaintiffs, however, chose not to amend their complaint, and there are no appellate issues concerning MCL 600.5839(1)(b).

> The primary goal of statutory construction is to give effect to the Legislature's intent. This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted. When reviewing a statute, all non-technical words and phrases shall be construed and understood according to the common and approved usage of the language, MCL 8.3a, and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal. A court should consider the plain meaning of a statute's words and their placement and purpose in the statutory scheme. Where the language used has been subject to judicial interpretation, the legislature is presumed to have used particular words in the sense in which they have been interpreted. [Citations and quotation marks omitted.]

By enacting MCL 600.5839, the Legislature chose to limit the liability of architects, engineers, and contractors in order to relieve them of the potential burden of defending against lawsuits commenced long after an improvement was completed. *Ostroth*, 474 Mich at 43, citing *O'Brien v Hazelet & Erdal*, 410 Mich 1, 14; 299 NW2d 336 (1980); see also *Ali v Detroit*, 218 Mich App 581, 587-588; 554 NW2d 384 (1996) (purpose of MCL 600.5839 is to "shield architects, engineers, and contractors from stale claims and relieve them of open-ended liability for defects in workmanship"). In *Ostroth*, 474 Mich at 43, our Supreme Court, quoting *O'Brien*, 410 Mich at 15, stated:

> "[T]he instant statute is both one of limitation and one of repose. For actions which accrue within six years from occupancy, use, or acceptance of the completed improvement, the statute prescribes the time within which such actions may be brought and thus acts as a statute of limitations. When more than six years from such time have

> elapsed before an injury is sustained, the statute prevents a cause of action from ever accruing."

We have surveyed the Michigan and federal cases interpreting MCL 600.5839 and specifically the language "an improvement to real property." As gleaned from the caselaw, the following factors should be examined in determining whether the PRP used in the art classroom addition constituted an improvement to real property: (1) the general nature of the PRPs, (2) whether the PRPs were integral components or essential to the operation of the art classroom addition, (3) whether the purchase, placement, and utilization of the PRPs required the expenditure of labor and money and increased the usefulness of, added value to, bettered, or enhanced the capital value of the art classroom addition in relationship to the structure's intended use and purpose, and (4) the permanence of the PRPs, taking into consideration whether they were affixed, bolted, mounted, or otherwise physically annexed to the art classroom addition and whether their placement has been, or was intended to be, longstanding or for an indefinite period, remembering that "permanent" does not mean "eternal" and that the ability to remove an object without damaging realty does not preclude a finding of permanence. *Miller-Davis Co v Ahrens Constr, Inc*, 285 Mich App 289, 304-305; 777 NW2d 437 (2009), rev'd on other grounds 489 Mich 355 (2011) (installation of wooden roof deck system constituted an improvement to real property); *Pitsch*, 233 Mich App at 601 (removal of underground storage tank was not an improvement to real property); *Abbott v John E Green Co*, 233 Mich App 194, 197, 200-201; 592 NW2d 96 (1998) (installation of asbestos-containing materials in a foundry constituted an improvement to real property); *Travelers Ins Co v Guardian Alarm Co of Mich*, 231 Mich App 473, 478-480; 586 NW2d 760 (1998),

overruled in part on other grounds by *Miller-Davis Co*, 489 Mich 355 (installation of a new circuit panel box, a transformer, and a fire alarm system were each an improvement to real property); *Pendzsu v Beazer East, Inc*, 219 Mich App 405, 410-412; 557 NW2d 127 (1996) (relining and enlarging factory furnaces and coke ovens using asbestos-containing materials constituted an improvement to real property); *Fennell v John J Nesbitt, Inc*, 154 Mich App 644, 651; 398 NW2d 481 (1986) (installation of an HVAC system was an improvement to real property); *Adair v Koppers Co, Inc*, 741 F2d 111, 114-116 (CA 6, 1984) (a coal-handling conveyor at a plant constituted an improvement to real property); *Poly-Flex Constr, Inc v Neyer, Tiseo & Hindo, Ltd*, 582 F Supp 2d 892, 905 (WD Mich, 2008) (installation of a leak-detection system at a landfill was an improvement to real property); *Oakwood Hosp & Med Ctr v Goodwin Electronics*, 183 F Supp 2d 936, 940-941 (ED Mich, 2001) (televisions in hospital rooms constituted an improvement to real property); *Dominguez v Lanham Machinery Co, Inc*, 122 F Supp 2d 852, 856 (WD Mich, 2000) (installation of an industrial-sized oven at a bakery was an improvement to real property); *Matthews v Beloit Corp*, 807 F Supp 1289, 1292-1293 (WD Mich, 1992) (installation of a "stack calender" within a papermaking machine constituted an improvement to real property); *Phillips v Langston Corp*, 59 F Supp 2d 696, 703-705 (ED Mich, 1999) (machine to make boxes from cardboard constituted an improvement to real property).[3]

With respect to the general nature of the PRPs, unlike the objects or tangible items at issue in several of

[3] Decisions rendered by lower federal courts are not binding but may be considered persuasive. *Walters v Nadell*, 481 Mich 377, 390 n 32; 751 NW2d 431 (2008).

the cases cited earlier, the PRPs were part of the original designs and plans for the construction of the art classroom addition itself and the PRPs were actually incorporated into and placed in the addition as part of and during the construction project. As the trial court stated, the PRPs were "part and parcel" of the construction project. There can be no reasonable dispute that the construction project, which entailed the erection of a building, involved an improvement to real property. And given that utilization of the PRPs was part of the construction project, it is logical to conclude that installation of the PRPs themselves constituted an improvement to real property, as opposed to being viewed in isolation and outside the scope of the overall improvement. Additionally, the instant case does not present, nor should it have, any argument that placement of the PRPs in the art classroom addition was a simple repair matter rather than an improvement to real property. While the PRPs are movable, and indeed designed to be movable, the fact remains that they serve as *walls* in the art classroom addition. In general, interior walls create hallways, rooms, closets, and other spaces within a structure, and they are typically a significant feature of any building and construction project. We conclude that this factor favors a holding that the PRP that fell on Caron constituted an improvement to real property.

With respect to the question whether the PRPs were integral components or essential to the operation of the art classroom addition, we answer in the affirmative. Consistent with Caron's deposition testimony, there is no dispute that the art classroom addition was constructed for the purpose of providing space for instructional art classes and studio projects. Without the PRPs, there would simply be a large open area that would not be conducive to the wide range of separate, distinct, and overlapping art activities, classes, and projects being

carried out at any given time. Furthermore, as mentioned earlier, the PRPs serve as interior walls, and a wall, permanent or portable, is an integral component of any building. The PRPs also have attached shelves that provide storage space for art supplies. We conclude that this factor favors a holding that the PRP that fell on Caron constituted an improvement to real property.

With respect to whether the purchase, placement, and utilization of the PRPs required the expenditure of labor and money and increased the usefulness of, added value to, bettered, or enhanced the capital value of the art classroom addition in relationship to the structure's intended use and purpose, we again answer in the affirmative. As indicated in footnote 1 of this opinion, defendants maintain that subcontractor Wally Kosorki & Co, Inc., actually constructed the PRPs, and there is a work-change order in the record signed by Christman and Cranbrook referring to the installation of PRPs by Kosorki. This document lists a cost of $9,225 for Kosorki's services in relationship to the change order. Accordingly, there is evidence of an expenditure of labor and money associated with the acquisition and placement of the PRPs as part of going forward with the construction project, and plaintiffs make no claim nor present any documentary evidence to the contrary. Furthermore, the PRPs increased the usefulness of or bettered the art classroom addition in light of the addition's intended use and purpose, which was to provide space for art classes and studio projects, given that use of the PRPs allowed for the creation of multiple, private, and varied class or work areas that are suitable for the particular needs of a class, instructor, or student. In regard to whether the PRPs enhanced the capital value of the art classroom addition or added value to the addition in a

monetary sense,[4] there was no specific documentary evidence, such as an appraisal, showing that the dollar or market value of the addition was increased as a result of the presence and use of the PRPs. That said, it is entirely reasonable to infer that, to some measurable degree, the capital value of the art classroom addition was enhanced or increased by the PRPs and that the PRPs added value to the addition. See *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994) (court's task in reviewing a motion for summary disposition entails consideration of the documentary evidence and all the reasonable inferences arising from that evidence). This inference is based on the evidence regarding the nature and characteristics of the PRPs, the beneficial manner in which the PRPs are used in connection with the building and school activities, and the expenditure of funds on the purchase and installation of the PRPs. We note that, in regard to this factor as well as the two factors addressed earlier, plaintiffs essentially present no arguments; the factors are virtually ignored by plaintiffs. We conclude that the present factor favors a holding that the PRP that fell on Caron constituted an improvement to real property.

Finally, with respect to the permanence of the PRPs, this is the factor that plaintiffs stress requires a holding that the placement of the PRPs in the art classroom addition did not constitute an improvement to real property. Plaintiffs repeatedly contend that the PRPs are not permanent because they are not affixed to the building itself and can be moved, which was the case with the PRP that fell on Caron; therefore, the PRPs, or the act of putting the PRPs in the building, did not constitute an improvement to real property. Plaintiffs

[4] For the reasons already alluded to, the PRPs added value to the art classroom addition on a nonmonetary level.

maintain that because the PRPs are fully portable, MCL 600.5839 cannot possibly apply. There is no documentary evidence indicating that the particular PRP in question had been affixed, annexed, or otherwise physically connected to the realty when Caron and the graduate student attempted to move it.[5]

We first note that the permanence factor is not dispositive but is merely one of the factors to consider, *Pendzsu*, 219 Mich App at 412, and the other three factors, apparently without dispute, weigh in favor of a finding that the PRP constituted an improvement to real property. Moreover, given their characteristics and that use of the PRPs in the art classroom addition has been longstanding and will apparently continue for an indefinite period, we conclude that the PRPs are permanent in nature despite their portability.

There is no evidence that the PRPs have ever been removed from the building itself or that there is a plan to someday remove the PRPs. Walls, even portable walls, tend to be permanent in the sense that they generally remain at the site or location of the structure they serve, and the PRPs are crucial to the support and operation of Cranbrook's art classes and activities. Osler's manager on the construction project averred in an affidavit that Osler "provided the design for partition walls within the classroom addition." And blueprints of the construction project suggest that the PRPs

[5] During Caron's deposition testimony explaining the preliminary steps taken in the attempt to move the PRP, she gave no indication whatsoever that the PRP had to first be disconnected from the floor, ceiling, or any architectural wall. Plaintiffs' expert, W. Thomas Munsell, a registered professional engineer, averred in his affidavit that when he examined the PRP, it was "fully movable on its casters and [was] not connected, affixed, attached or joined to the architectural walls, ceiling, floor, windows or any other element of the structure of the room or the building."

were shaped, sized, or otherwise custom-designed, fitted, and constructed specifically for the art classroom addition and its dimensions, rendering them less adaptable, if at all, for use in a different building or environment. Furthermore, we are not dealing with flimsy, lightweight, easily movable or removable partitions that can be displaced at a whim, which is evident from the accident that occurred. Plaintiffs' expert, Munsell, averred that the PRP at issue is $7^1/_2$ feet tall and weighs approximately 2,100 pounds. The trial court noted that the PRPs are "substantial." There is no indication that the PRPs are anything but a permanent part of the art classroom addition despite the lack of annexation.

A case that we find persuasive is *Reames v Hawthorne-Seving, Inc*, 949 SW2d 758 (Tex App, 1997), wherein an employee at a ceramic tile plant was injured by a conveyor belt while he was working, and the conveyor was the first of three that operated in tandem to move powder used in making tiles to a storage area.[6] The second and third conveyors were bolted to the floor, but the first conveyor was not so bolted and instead "was on wheels solely because it was directly under [a] dryer, which needed to be cleaned regularly and could not be cleaned unless the first conveyor could be moved aside." *Id*. at 760. The plaintiffs argued that the first conveyor was not an improvement to real property under the Texas statute of repose "because it was not annexed to the realty and was easily moved." *Id*. at 762. The Texas Court of Appeals held:

> We note that in considering whether an item is attached to realty, the supreme court looks to the mode and sufficiency of the annexation, *either real or constructive.* In this

[6] Judicial decisions from foreign jurisdictions are not binding but may be considered persuasive. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006).

> case, although the first conveyor was on wheels, and therefore not annexed to the realty physically, it was constructively annexed to the realty. The first conveyor was not bolted to the floor, or physically annexed to the realty, as the other two conveyors were only because if it had been bolted to the floor, workers could not clean the dryer located above the conveyor. The first conveyor was never moved for any purpose other than to reach the dryer and was never moved more than four or five feet. Furthermore, the conveyor was so adapted to the use of the realty, making tiles, that a critical phase of the process, transporting the dried powder from the dryer to the storage silo, could not be performed unless the first conveyor was in place. Under these circumstances, we conclude that although the first conveyor technically could be moved, it was constructively annexed to the realty because [the company] never intended to move it more than a few feet as necessary for its operations and never moved it for any other purpose. The first conveyor was constructively annexed to the property as effectively as the other conveyor belts were, and it was specifically adapted to the purpose of the tile plant. These factors are all evidence of [the company's] intent that the conveyor be an addition to the freehold, and we conclude the first conveyor was an improvement as a matter of law. [*Id*. (citation omitted).]

The same can be said for the PRPs in this case, which were also designed or intended for a particular building and to be movable for a specific critical function within the building, i.e., altering classroom and studio space as needed. The PRPs are constructively annexed to the art classroom addition.[7]

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[7] We also note the case of *Kohn v Darlington Comm Sch*, 2005 WI 99; 283 Wis 2d 1; 698 NW2d 794 (2005), wherein the Wisconsin Supreme Court held that allegedly defective high school football bleachers constituted an improvement to real property under the Wisconsin 10-year statute of repose. The plaintiffs argued that the bleachers were not anchored in the ground and were portable; therefore, they could not constitute an improvement to real property. *Id*. at ¶ 15; 283 Wis 2d at 14. Finding it unnecessary to determine the accuracy of the plaintiffs' factual allega-

Plaintiffs' reliance on *Vegel v Detroit Entertainment, LLC*, unpublished opinion of the United States District Court, Eastern District of Michigan, issued November 20, 2007 (Docket No. 02-CV-73720-DT), aff'd 316 Fed Appx 468 (CA 6, 2009), is misplaced, given that a free-standing restaurant table, which was at issue in *Vegel*, is distinguishable from the PRP, given that a wall is typically a more integral part or component of a structure. To the extent that the cases cannot be distinguished, the *Vegel* opinion is not binding on us and we decline the invitation to invoke it in the manner plaintiffs suggest.

Finally, plaintiffs contend that summary disposition was premature because further discovery was necessary to determine whether the PRPs actually increased the value of the art classroom addition. As indicated earlier, it is reasonable to infer that, given the nature and characteristics of the PRPs, the purchase and installation costs of the PRPs, and the benefits of using the PRPs to create and adjust instructional and studio space, they necessarily increased the value of the art classroom addition to some extent. Summary disposition is generally premature if discovery is not complete. *Prysak v R L Polk Co*, 193 Mich App 1, 11; 483 NW2d 629 (1992). "However, summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion." *Id*. "[A] party opposing a motion for summary disposition because discovery is not complete

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tions and taking notice of the bleachers' large dimensions, their purpose and utility, the intent to keep them in place, and the bleachers' stationary history, the court ruled that annexation was not dispositive and that "a given item need not be actually physically annexed to the land in order to constitute a permanent addition to or betterment of property." *Id*. at ¶¶ 15-27; 283 Wis 2d at 14-21. We find the analysis persuasive and equally applicable here.

must provide some independent evidence that a factual dispute exists." *Mich Nat'l Bank v Metro Institutional Food Serv, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993). Mere speculation that additional discovery might produce evidentiary support is not sufficient. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 540-541; 687 NW2d 143 (2004). Plaintiffs fail to identify any prospective evidence that would indicate that the PRPs added no capital value to the art classroom addition, nor is there a fair chance of any such evidence existing. Accordingly, we reject plaintiffs' argument.

Affirmed. Having fully prevailed on appeal, defendants are awarded taxable costs pursuant to MCR 7.219.

MARKEY and WHITBECK, JJ., concurred with MURPHY, C.J.

CITY OF WESTLAND v KODLOWSKI

Docket No. 301774. Submitted April 3, 2012, at Detroit. Decided December 4, 2012, at 9:00 a.m. Leave to appeal sought.

A jury in the 18th District Court, Mark McConnell, J., convicted Jeffrey Kodlowski of resisting arrest in violation of Westland Ordinances, § 62-36(a) and acquitted him of assault and battery. The charges arose from an incident that occurred when defendant's wife called the police to report that defendant had taken her purse, keys, and cell phone and refused to return them. One of the two Westland police officers who responded to her call made antagonistic remarks to defendant upon entering the home. Defendant responded that he would not return his wife's cell phone and either touched or grabbed one of the officers by the arm, and the officers forcibly arrested defendant, striking him on the head and arm with a baton as he struggled to avoid being handcuffed. After the court denied defendant's motion for a new trial, the Wayne Circuit Court, Craig S. Strong, J., denied defendant's motion for oral argument and, in a separate order, affirmed his conviction and sentence. Defendant appealed both orders by leave granted and ultimately paid two filing fees after initially arguing that he was only required to pay one.

The Court of Appeals *held*:

1. Defendant was required to pay two filing fees when filing his application for leave to appeal two separate orders. MCL 600.321 provides that a fee of $375 must be paid to the clerk of the Court of Appeals for an appeal as of right, for an application for leave to appeal, or for an original proceeding. MCR 7.205(A)(1) provides that an application for leave to appeal must be filed within 21 days after entry of the judgment or order appealed, while MCR 7.205(A)(2) addresses when to file applications for leave to appeal an order deciding motions for new trial, reconsideration, or other such relief. Additionally, MCR 7.205(B)(2) specifies the number of copies of the judgment or order appealed that must be submitted with the application. Therefore, an application is to be filed for leave to appeal an order or the judgment that is sought to be appealed. Thus, MCR 7.205 requires that a separate application be filed for each order or judgment appealed. Consequently, although

Court of Appeals Internal Operating Procedure 7.205(B)(7)-1 allows a party to file one application for leave to appeal separate orders for administrative convenience, the fee set forth in MCL 600.321 must be paid for each order being appealed.

2. The circuit court erred by denying defendant an opportunity for oral argument before the appeal from the district court was decided; however, reversal or remand was not required because the error was harmless. MCR 7.101(K) provides that any party who has filed a timely brief on appeal from the district court to the circuit court is entitled to oral argument if the party requests it in boldface type on the title page of the party's brief, and defendant complied with this provision. Given that the Supreme Court has not provided any particular sanction for violations of MCR 7.101(K), however, they are subject to the harmless-error test set forth in MCR 2.613(A), which states that an error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not a ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order unless refusal to take that action appears to the court inconsistent with substantial justice. Further, under MCR 1.105, the rules must be construed to secure the just, speedy, and economical determination of every action and avoid the consequences of error that does not affect the substantial rights of the parties. In this case, the circuit court's failure to allow oral argument was not inconsistent with substantial justice given that courts routinely decide cases and motions without oral argument; that the briefs were required to contain all the arguments, issues, facts, law, and relevant documentary evidence necessary for a proper resolution of the case; and that defense counsel presented oral argument to the Court of Appeals on the same issues that were presented in writing to the circuit court.

3. The district court did not improperly exclude evidence regarding the extent and nature of the injuries that defendant sustained during his arrest, the officers' use of excessive force, or the police department's policies and procedures when employing force. Under MRE 402, all relevant evidence is admissible unless otherwise provided by constitution or court rule. Relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. It was not an abuse of discretion to exclude evidence that defendant was hospitalized after his arrest or the nature and extent of his injuries because that evidence was irrelevant to determining whether defendant had

committed the charged crimes of assault and battery and resisting arrest. Similarly, evidence regarding the officers' use of excessive force was irrelevant to a determination of whether defendant committed assault and battery or resisted arrest because both charges focused on defendant's conduct, not the conduct of the officers. The police department's procedures, manuals, and policies were properly excluded as inadmissible hearsay evidence. Exclusion of this evidence did not deprive defendant of his right to present a defense. While the right to present a defense is a fundamental element of due process, it extends only to relevant and admissible evidence. Further, defendant was able to introduce evidence, including his testimony, his wife's testimony, and an audio recording of the incident, to support his theory that he was not resisting arrest but, rather, that the officers had fabricated the incident to conceal the excessive force they employed against him at his residence.

4. The district court did not err by excluding the transcript of the audio recording of what transpired at defendant's residence. Before submitting a transcript of an audio recording to a jury, the trial court should take steps to ensure its accuracy. The preferred procedure is to have the parties stipulate the transcript's accuracy. Absent a stipulation, the trial court may verify the transcript's accuracy by relying on the verification of the transcriber, by independently comparing the transcript with the audio recording, or by using other procedures that ensure the reliability of the transcript. The trial court may also decline to admit a prepared transcript and instead allow the jury to determine the contents of the audio recording itself. Because the prosecution refused to stipulate the accuracy of the transcript, the district court acted within its discretion by allowing the jury to determine the content of the audio recording at trial.

5. The district court did not err by failing to suppress the officers' testimony regarding the statements defendant made during his arrest on the ground that defendant had revoked his consent to the officers' presence, rendering their continued presence a Fourth Amendment violation. Because defendant failed to file a pretrial motion to suppress the statements, he had to establish that an error occurred, that the error was plain, and that the plain error affected his substantial rights. Reversal would have been warranted only if the plain, forfeited error had resulted in the conviction of an actually innocent defendant or if an error seriously affected the fairness, integrity, or public reputation of judicial proceedings independently of the defendant's innocence. Both the United States and Michigan Constitutions guarantee the right to be free from unreasonable searches and seizures. While warrantless searches and seizures are

unreasonable per se, there are several exceptions that validate an otherwise unreasonable search and seizure, including voluntary consent that is given freely, intelligently, specifically, and unequivocally. Consent may be limited in scope, may be revoked, and is valid if obtained from the person whose property is to be searched or from a third party that has common authority over the property. An occupant who is present on the premises may invalidate the consent given by another occupant by expressly objecting to the search if the police are entering to search for evidence; however, an occupant's withdrawal of consent does not preclude officers from continuing to investigate cases of potential domestic violence. In this case, defendant's withdrawal of consent was irrelevant to the Fourth Amendment analysis because the officers were responding to a domestic dispute and therefore had an obligation to investigate potential domestic violence. Consequently, defendant's decision to revoke his consent did not render the officers' presence unlawful, and defendant failed to establish that admitting the statements constituted a plain error affecting his substantial rights.

6. *People v Moreno*, 491 Mich 38 (2012), which held that the Legislature had not abrogated the common-law right to resist an unlawful arrest and overruled the contrary holding in *People v Ventura*, 262 Mich App 370 (2004), applies only to cases in which the defendant has either preserved the issue in the trial court and raised it on appeal or can show that plain error occurred. To determine whether a decision applies with full retroactive effect, courts consider whether prosecutors and trial courts relied on the previous rule in making decisions about whether to charge or convict and whether applying the decision retroactively would undermine the interest in finality of convictions and disrupt the effective administration of justice. If so, a ruling may be applied to only those cases in which the defendant had raised the exception on appeal and preserved the issue in the trial court or was entitled to relief because of a plain error affecting the defendant's substantial rights. *Moreno* was given limited retroactive application because prosecutors, defendants, and trial courts had relied on *Ventura* in making decisions affecting charging, trial strategy, and guilt or innocence, and applying *Moreno* to all cases would detrimentally affect the effective administration of justice. *Moreno* did not apply in this case given that defendant never raised the defense that he was resisting an arrest that was unlawful because the officers used excessive force and in fact testified that he did not resist the officers, a position completely at odds with an available defense under *Moreno*.

Affirmed.

Judge SHAPIRO, dissenting, would have reversed and remanded for a new trial on the charge of resisting arrest to determine whether the underlying arrest was lawful as required under *Moreno*, noting that the only justification the officers described for initiating the physical contact with defendant was the need to arrest him for the alleged assault that the jury concluded did not occur and further noting that defendant could not have preserved this issue for appeal given that the jury would not have been permitted to consider it under *Ventura*. Judge SHAPIRO would have held that retroactive application of *Moreno* was proper in this case given that the trial court plainly erred by failing to instruct the jury that a necessary element of resisting arrest is that the underlying arrest was lawful, which affected the substantial right of a defendant to a jury instructed on the elements of the offense as well as the fairness of the proceeding. Judge SHAPIRO further stated that because a failure to instruct the jury on an element of the offense is a form of structural constitutional error that undermines the entire legal process, *Moreno* was precisely the type of ruling that is always given retroactive effect.

1. APPEAL — APPLICATIONS FOR LEAVE TO APPEAL — FEES.

MCL 600.321 requires that a fee be paid to the clerk of the Court of Appeals for an appeal as of right, for an application for leave to appeal, or for an original proceeding; this fee must be paid for each order being appealed regardless of whether only one application was filed.

2. APPEAL — CIRCUIT COURTS — RIGHT TO ORAL ARGUMENT — VIOLATIONS OF RIGHT TO ORAL ARGUMENT — REMEDIES.

MCR 7.101(K) provides that a party who has filed a timely brief on appeal from the district court to the circuit court is entitled to oral argument if the party requested it in boldface type on the title page of the party's brief; violations of a party's right to oral argument under MCR 7.101(K) are not grounds for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order unless refusal to take that action appears to the court inconsistent with substantial justice.

3. EVIDENCE — RELEVANCE — ASSAULT AND BATTERY — RESISTING ARREST — EVIDENCE OF POSTARREST INJURIES — RIGHT TO PRESENT A DEFENSE.

Under MRE 402, all relevant evidence is admissible unless otherwise provided by constitution or court rule; relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence; evidence of

a defendant's postarrest injuries is irrelevant to determining whether the defendant resisted arrest or committed an assault or battery; the right to present a defense extends only to relevant and admissible evidence.

4. EVIDENCE — TRANSCRIPTS OF AUDIO RECORDINGS — ACCURACY OF TRANSCRIPTS.

A court should take steps to ensure the accuracy of a transcript of an audio recording before submitting the transcript to the jury; the preferred procedure is to have the parties stipulate the transcript's accuracy; absent a stipulation, a court may verify a transcript's accuracy by relying on the verification of the transcriber, by independently comparing the transcript with the audio recording, or by using other procedures that ensure the reliability of the transcript; a court may decline to admit a prepared transcript and instead allow the jury to determine the contents of an audio recording itself.

5. CONSTITUTIONAL LAW — SEARCHES AND SEIZURES — WARRANTLESS SEARCHES AND SEIZURES — CONSENT — WITHDRAWALS OF CONSENT — WARRANTLESS INVESTIGATIONS OF DOMESTIC VIOLENCE.

The United States and Michigan Constitutions guarantee the right to be free from unreasonable searches and seizures; warrantless searches and seizures are generally unreasonable per se; an otherwise unreasonable search and seizure may be rendered valid by voluntary consent that is given freely, intelligently, specifically, and unequivocally; consent may be limited in scope, may be revoked, and is valid if obtained from the person whose property is to be searched or from a third party that has common authority over the property; an occupant who is present on the premises may invalidate the consent given by another occupant by expressly objecting to the search if the police are entering to search for evidence; an occupant's withdrawal of consent, however, does not preclude officers from continuing to investigate cases of potential domestic violence (US Const; Am IV, Const 1963, art 1, § 11).

Fausone Bohn, LLP (by *Keith W. Madden* and *Michael M. McNamara*), for the city of Westland.

The Corriveau Law Firm, P.C. (by *Joseph P. Corriveau*), for Jeffrey Kodlowski.

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

MURRAY, J. Defendant, Jeffrey Kodlowski, appeals by leave granted two orders of the circuit court. The first

order embodies the circuit court's decision affirming the district court's judgment convicting defendant of resisting arrest in violation of Westland Ordinance, § 62-36(a), while the second order denies defendant's motion for reinstatement of oral argument. We affirm both orders.

I. FACTS AND PROCEEDINGS

This case arises from a marital dispute that resulted in the arrest of defendant after he allegedly battered two Westland Police Officers, Michael Little and Kyle Dawley, and resisted arrest in his Westland residence. On March 18, 2009, Marilyn Kodlowski resided with defendant (her husband), son, and daughter in the city of Westland. Around 4:00 a.m., Kodlowski and defendant had a disagreement regarding Kodlowski's cellular telephone. Defendant accused Kodlowski of having an extramarital affair, and he wanted to see Kodlowski's cellular telephone to determine to whom she had been talking.

Kodlowski called the Westland Police Department on two occasions that morning to seek assistance in retrieving the personal belongings that defendant withheld from her. After calling the police the first time, Kodlowski handed defendant the phone, defendant spoke with the police, and then defendant provided Kodlowski her keys and purse, but not her cellular telephone. Kodlowski called the second time to receive assistance in retrieving her cellular telephone from defendant.

After the second phone call, Little and Dawley arrived at the residence in uniform and located Kodlowski in the driveway near her van. When first speaking with the officers, Kodlowski informed them that she had had an argument with defendant and that he accused her of

cheating on him, but there had never been violence in the home and defendant had not been drinking. There was conflicting testimony as to whether Kodlowski informed the officers that there were no weapons in the residence.

After speaking with the officers, Kodlowski walked with the officers to the residence and defendant "allowed them in." Again, there was conflicting evidence regarding defendant's demeanor when the officers first entered the house. Nevertheless, the officers proceeded to talk to defendant and inquire into the location of the cellular telephone. Although the testimony was not consistent on what was initially said upon entering the home, there is no dispute that Officer Dawley made several antagonistic and sarcastic remarks to defendant, and that when defendant was asked where the cellular telephone was located, defendant responded by saying something along the lines of, "I'm not giving the phone back. You'll have to arrest me."

In order to control the situation, Little instructed defendant to sit down in a chair, after which, according to Little, defendant changed his mood from irritated to calm. At one point, defendant became irritated, stood up and attempted to go to the back bedroom. Little, however, instructed defendant to stay in the chair. Little observed that when defendant stood up, "[h]e looked irritated. He had [a] clenched fist down at his side and on and off would tighten his neck and jaw muscles and he just looked mad and upset." Little then placed his arm on defendant's chest to keep defendant at a distance and to keep defendant from going to the back bedroom. As Little spoke with defendant, Dawley walked with Kodlowski around the house looking for the cellular telephone.

According to Kodlowski, defendant asked the officers to leave. While the officers were present, Kodlowski grabbed defendant's wallet and told him that she would take his wallet if he did not return her cellular telephone. However, Kodlowski then decided to leave the residence without her phone. Little believed at that point that the incident was over, so he followed Kodlowski toward the front door as Dawley followed. As Little was walking out of the door, he felt defendant grab and squeeze his left arm. As witnessed by Dawley, defendant then "spun" Little around so that he was facing defendant. Little then used his arm to create distance between himself and defendant, and after telling defendant that he was under arrest, Little and Dawley each grabbed onto one of defendant's arms so that he could be handcuffed.

Defendant then "started pulling and just kind of thrashing his body, swinging his arms to try to make [Little] let go." Little indicated that as defendant twisted and attempted to break from the officers' grip, the officers and defendant ended up on the couch. Dawley then instructed defendant to stop resisting, but defendant continued to thrash his body and swing his arm. While trying to secure defendant in handcuffs, defendant kicked backward, "like a rearward kick," striking Dawley.

After defendant continued to twist, Dawley applied a brachial stun to defendant's neck, yet defendant continued to twist and fight the officers Dawley then pulled out his baton and struck defendant on his arm and the top of the baton "also hit the back of [defendant's] head." Dawley testified that after he struck defendant's arm, defendant released his grip, Officer Dawley dropped the baton, grabbed the handcuffs, and the officers were then able to secure defendant with the

handcuffs. Dawley indicated that he struck defendant once with the baton.[1] Both Kodlowski, who "could see everything that was going on" and defendant testified that defendant was not resisting when Dawley instructed defendant to "stop resisting." Defendant in fact testified that he never offered any resistance to the officers and never engaged in physical contact with them.

The prosecutor filed a motion in limine in the district court, seeking to exclude evidence regarding the nature and extent of defendant's injuries and any documentary evidence concerning the department policy on the use of force. Defendant argued that the evidence was relevant to show that the officers fabricated the facts of the case to cover up their use of excessive force, while the prosecution argued that the evidence would be relevant to a civil claim for excessive use of force, not to any issues in the criminal case.

The prosecution also separately raised the issue of the admissibility of a transcript prepared from an audio recording which captured a portion of the events surrounding defendant's arrest.[2] Apparently defense counsel intended to either have the transcript read to the jury, or have the jury read the transcript while listening to the audio recording. The prosecution's position was that the transcript was inaccurate and therefore inadmissible. The district court indicated that it would be for the jury to determine the content of the audio

[1] Defendant alleges in his brief on appeal that the officers "inflicted a large gash several inches long on the back of his head, which required . . . emergency medical attention . . . ." As will be discussed later in this opinion, the trial court excluded from trial any evidence regarding the extent and nature of defendant's injuries.

[2] During defendant's arrest, one of the officers was wearing a lapel recording device.

recording, and that it could do so through the playing of the audio recording for the jury.

In regard to the prosecution's motion to exclude evidence, the district court concluded that because defendant was charged with assault and battery along with resisting arrest, any evidence regarding the treatment and nature of defendant's injuries was irrelevant and thus inadmissible. The district court indicated, however, that it would allow defendant to introduce evidence that he was injured during the exchange. The district court then decided to withhold until trial its final ruling of whether to exclude documentary evidence regarding department policy, procedures, and records, as well as any expert testimony, concerning the use of force. At trial the court made its ruling:

> Based on the testimony that -- that I've heard so far, we've -- we've had — we've had four people that were in the room. We've heard from three of them. Defense did indicate earlier that the Defendant would be testifying. Obviously, he doesn't -- you don't have to be held by that, but I think so far I would find that -- that testimony from an expert on the use of force and force scale -- continuum scale, I don't think would assist the trier of fact to understand the evidence or to determine a fact and [sic] issue.
>
> Furthermore, we have audio from the incident that's already been played for the Jury, so I think . . . all of the facts that led to these charges have been heard by the Jury and I think that they can make a determination based on the law and the facts that we've gotten from the witness stand so far without any need for any technical or expert assistance.

On October 5, 2009, the jury found defendant not guilty of the assault and battery charges but guilty of resisting arrest. The district court's judgment of conviction was appealed to the circuit court, which denied oral argument on the appeal and affirmed the convic-

tion. Defendant then filed an application for leave to appeal both orders, which we granted.

II. ANALYSIS

A. FILING FEE

In our order granting defendant leave to appeal, we directed defendant to "address in his brief why he should not be required to pay an additional entry fee for the second order being appealed under MCL 600.321(1)(a)." *People v Kodlowski*, unpublished order of the Court of Appeals, entered August 31, 2011 (Docket No. 301774). We did so because when filing his application from the two separate orders, defendant refused to pay two filing fees, arguing that this Court's Internal Operating Procedure (IOP) regarding fees applicable to appeals (which requires two separate fees) misinterprets MCL 600.321.[3]

MCL 600.321, which governs the taxation of costs and fees for appeals to this Court, provides in relevant part:

> (1) The following fees shall be paid to the clerk of the court of appeals and may be taxed as costs if costs are allowed by order of the court:
>
> (a) For an appeal as of right, for *an* application for leave to appeal, or for an original proceeding, $375.00. This fee shall be paid only once for appeals that are taken by multiple parties from the same lower court order or judgment and can be consolidated. [Emphasis added.]

IOP 7.205(B)(7)-1, which interprets MCL 600.321, provides that a fee must be paid for each order appealed:

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[3] After oral argument before this Court defendant paid a second filing fee, with our instruction that if he should prevail the second fee would be immediately returned.

> The entry fee is set by statute, MCL 600.321. Presently, the fee is $375. *When multiple orders on the merits are appealed, the entry fee is $375 for each order being appealed* (an order denying rehearing is not an order on the merits). However, only a single fee is required when the application for leave to appeal is from a final order, as defined by MCR 7.202(6)(a)(i), that could have been appealed of right and when the application seeks review of the multiple orders entered at the same time or prior to the final order. If the clerk's office determines that an inadequate entry fee was submitted, the outstanding amount will be requested by letter. Fee payment may be made by personal or corporate check or money order. [Emphasis added.]

Defendant argues that the use within MCL 600.321 of the singular "an" prior to indicating the manner of appeal indicates that a party is required to pay one fee for each appeal, regardless of the number of orders appealed, as long as the orders form the basis for the application for leave to appeal.

Defendant's argument is too limited: it ignores the corresponding court rules regarding applications for leave to appeal. In particular, MCR 7.205(A)(1) provides that "[*a*]*n* application for leave to appeal" must be filed within 21 days after entry of "*the* judgment or order" appealed from, while MCR 7.205(A)(2) addresses when to file applications from "*an* order" deciding motions for new trial, reconsideration, or other such relief. (Emphasis added.) Additionally, MCR 7.205(B)(2) specifies the number of copies of "*the* judgment or order appealed from" that need to be submitted with the application. (Emphasis added.)

Consequently, under our rules regarding applications for leave to appeal, an application is to be filed from "an" order or "the" judgment that is sought to be appealed. Thus, strictly applied, MCR 7.205 requires that a separate application be filed for each order or

judgment appealed.[4] But, under IOP 7.205(B)(7)-1, the Court has permitted the filing of one application seeking to appeal separate orders, but the statutory requirement of one filing fee per order is still enforced. In other words, rather than requiring separate applications challenging each separate order with a fee for each one, for administrative convenience (to both the parties and the Court) the Court has opted to allow one application to challenge multiple orders, but the statutory fee requirement has and must remain intact. Because defendant has now filed two fees for his challenge to the two separate orders, we have jurisdiction to decide both issues. We now turn to that task.

B. ORAL ARGUMENT

Turning to the first issue, defendant argues and we agree that the circuit court erred in denying defendant an opportunity for oral argument before the appeal from the district court was decided.[5] We review de novo the interpretation and application of a court rule. *People v Buie*, 285 Mich App 401, 416; 775 NW2d 817 (2009).

MCR 7.101 governs the general procedure applicable to appeals from the district court to the circuit court, and under MCR 7.101(K), "any party who has filed a timely brief on appeal and requested oral argument is entitled to oral argument." *In re Attorney Fees of Mullkoff*, 176 Mich App 82, 88; 438 NW2d 878

[4] Except, as indicated by IOP 7.205(B)(7)-1, when the application is filed from a final order, as case law provides that all interlocutory orders entered prior to the final order can be challenged in an appeal from the final order. See *People v Torres*, 452 Mich 43, 59; 549 NW2d 540 (1996).

[5] We note that the court rule on appeals to the circuit court was amended effective May 1, 2012, and that under the new rules a circuit court can under certain circumstances dispense with oral argument. MCR 7.114(A). This new rule does not apply to this case.

(1989). MCR 7.101(K) specifically provides that, "[a] party who has filed a timely brief is entitled to oral argument by writing 'ORAL ARGUMENT REQUESTED' in boldface type on the title page of the party's brief." Thus, the direct and plain language of MCR 7.101(K) requires the circuit court to provide a party with an opportunity to present an oral argument if it complies with MCR 7.101(K) by requesting oral argument when filing a brief on appeal. *People v Williams*, 483 Mich 226, 232; 769 NW2d 605 (2009) (courts must enforce the plain language of a court rule). Because defendant complied with this provision, the circuit court erred in denying defendant's motion for reinstatement of oral argument.

The failure to provide oral argument as required by MCR 7.101(K) does not require reversal or a remand. Generally, this Court will not impose a sanction for a violation of a court rule where the Supreme Court has not provided for any particular sanction, *In re Jackson*, 199 Mich App 22, 28-29; 501 NW2d 182 (1993); *In re Kirkwood*, 187 Mich App 542, 545-546; 468 NW2d 280 (1991), and since the Supreme Court did not provide a sanction or remedy for violation of MCR 7.101(K), we refrain from imposing a specific remedy for the violation.[6] Instead, such a violation raises the harmless error test set forth in MCR 2.613(A), which states:

> An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

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[6] In *Moore v Spangler*, 401 Mich 360, 368-371; 258 NW2d 34 (1977), the Court held that the failure to provide oral argument does not violate a party's right to due process.

Further, this Court must construe the rules "to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties." MCR 1.105. In applying MCR 2.613(A), we reach the inescapable conclusion that the failure of the circuit court to allow oral argument was not inconsistent with substantial justice. This holds true for two reasons.

First, the inability to present oral argument is not a significant detriment to success on appeal. Indeed, our Court and the Supreme Court have the ability to—and do—decide cases without oral argument on a routine basis. See MCR 7.214(E); MCR 7.302(H). So do circuit courts when deciding motions. MCR 2.119(E)(3). Briefs filed with our Court or the circuit court should contain all of the arguments, issues, facts and law necessary for a proper resolution of the case. See MCR 7.212(C); MCR 2.119(A)(2). Additionally, briefs should have relevant documentary evidence attached as exhibits. Thus, by reading the briefs the court should already know each party's position and the reasons why that position should prevail on appeal. Assuming such a proper brief was filed on appeal—as it was in this case when defendant filed his appeal to the circuit court—missing out on 15 or 30 minutes of argument will not be inconsistent with substantial justice. Indeed, if the brief is written and prepared as it should be and the party is entitled to prevail under the law, that party must succeed, whether the party had oral argument or not. Second, we point out that defense counsel did present oral argument to this Court on the same issues that he presented in writing to the circuit court, and so any loss of oral argument below was harmless.

C. EVIDENTIARY ISSUES

Defendant also argues that the trial court improperly excluded (1) evidence regarding the extent and nature of injuries he sustained during his arrest, (2) evidence regarding the use of excessive force, and (3) evidence regarding the police department's policies and procedures when employing force. Specifically, defendant argues that this evidence is relevant to show that the officers employed excessive force and that in order to conceal the use of such force, the officers fabricated the charges against defendant.

We will not disturb a trial court's decision to exclude evidence unless it is established that it abused its discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). Decisions regarding the admission of evidence frequently require a review de novo since they generally involve preliminary questions of law. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). If a trial court admits evidence that as a matter of law is inadmissible, it abuses its discretion. *Id*. Ordinarily, however, a trial court's decision on a close evidentiary question cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

Under MRE 402, all relevant evidence is admissible unless otherwise provided by constitution or court rule. *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). "Relevant evidence" is evidence which has " 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' " *People v Crawford*, 458 Mich 376, 388; 582

NW2d 785 (1998), quoting MRE 401. It was not an abuse of discretion to exclude evidence of the defendant's hospitalization after his arrest because that evidence was irrelevant to determining whether defendant committed the charged crimes of assault and battery and resisting arrest. *People v Solak*, 146 Mich App 659, 674; 382 NW2d 495 (1985). Similarly, evidence regarding the extent and nature of defendant's injuries, along with evidence regarding the use of excessive force, is irrelevant to a determination of whether defendant committed the crime of assault and battery or resisting arrest.[7] The extent of defendant's injuries or whether the officers employed excessive force does not make it any less or more probable that defendant battered the officers or resisted arrest. Both charges focus on the conduct of defendant, not on the conduct of the officers. Therefore, we conclude that even if the officers employed excessive force, it is irrelevant to prove or disprove that defendant battered the officers or resisted arrest. As both trial courts correctly noted, this evidence may well be relevant in a civil matter where the jury has to determine whether the force employed by the officers was reasonable, see *Alexander v Riccinto*, 192 Mich App 65; 481 NW2d 6 (1991); *Guider v Smith*, 157 Mich App 92; 403 NW2d 505 (1987), aff'd 431 Mich 559 (1988),[8] but it is not in this case because what happened after the crimes would have been committed is not relevant to whether the crimes were committed.

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[7] Westland Ordinances, § 62-36(a), which governs resisting arrest, states, "No person shall resist arrest, or physically obstruct an arrest, by any officer empowered to make arrests." Westland Ordinances, § 62-67, which governs battery, states in relevant part, "No person shall with force or violence touch or put some substance in motion which touches another person or something closely connected with another person."

[8] While the evidence proving that the officers employed excessive force may be slightly relevant to show that the officers used greater force than indicated at trial, which would undermine the officers' credibility, the

Further, the police department's procedures, manuals, and policies were properly excluded as inadmissible hearsay evidence. *McCallum v Dep't of Corrections*, 197 Mich App 589, 598; 496 NW2d 361 (1992).

We also disagree with defendant's argument that the exclusion of this evidence deprived him of his right to present a defense. While "[t]he right to present a defense is a fundamental element of due process . . . it is not an absolute right" as it extends only "to relevant and admissible evidence." *People v Likine*, 288 Mich App 648, 658; 794 NW2d 85 (2010), rev'd on other grounds 492 Mich 367 (2012). Accordingly, defendant was not deprived of his right to present a defense when denied the opportunity to present irrelevant and inadmissible evidence at trial. Further, defendant was able to introduce evidence, including his testimony, Kodlowski's testimony, and the audio recording, to support his theory that he was not resisting arrest but, rather, that the officers fabricated the incident to conceal the excessive force they employed against him at the residence. Therefore, we conclude that the trial court did not abuse its discretion in excluding evidence regarding the use of force or the extent and nature of defendant's injuries.

Defendant also argues that the trial court erred in excluding the prepared transcript of the audio recording where it would have assisted the jury in determining what transpired at defendant's residence.

Before submitting a transcript of an audio recording to the jury, the trial court should take steps to ensure its accuracy. *People v Lester*, 172 Mich App 769, 775-776; 432 NW2d 433 (1988). The preferred procedure is to

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trial court did not abuse its discretion in excluding such evidence due to the close nature of the evidentiary question. *Sabin (After Remand)*, 463 Mich at 67.

have the parties stipulate to the transcript's accuracy. *Id*. at 775. Absent a stipulation, the trial court may verify the transcript's accuracy by relying on the verification of the transcriber or by conducting an independent determination by comparing the transcript with that of the audio recording. *Id*. at 776. These procedures are not exhaustive, as the aim is to utilize procedures that ensure the reliability of the transcript. *Id*. at 775. Thus, under certain situations the trial court may find that the best course of action is to allow the jury to determine the contents of the audio recording itself and decline to admit a prepared transcript. This is such a case, as the prosecution refused to stipulate to the accuracy of the transcript. In the absence of a stipulation, the trial court was acting well within its discretion by concluding that it would be best for the jury to determine the content of the audio recording at trial.[9] The district court did not abuse its discretion in excluding the transcript of the audio tape.

Turning to a different sort of evidentiary question, defendant argues that the police officers violated his Fourth Amendment rights by remaining at his residence after he revoked his consent to their presence and, therefore, the officers' testimony regarding defendant's statements made during his arrest should have been suppressed by the district court.

Due to defendant's failure to file a pretrial motion to suppress his statements to police, we review defendant's unpreserved assertion of constitutional error for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To establish plain error, defendant must show that (1)

[9] Interestingly, during trial one of the witnesses testified that the transcript contained inaccuracies, and the clarity of the audio recording itself is not such that would lead to a stipulation as to its accuracy.

an error occurred, (2) the error was plain, and (3) the plain error affected his substantial rights. *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error ' "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.' " *Carines*, 460 Mich at 763, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (citation omitted).

Both the United States and Michigan Constitutions guarantee the right to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 011. While warrantless searches and seizures are unreasonable per se, there are several exceptions that validate an otherwise unreasonable search and seizure, including voluntary consent. *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). Consent must be given freely, intelligently, specifically, and unequivocally. *Id*. Further, "consent may be limited in scope and may be revoked." *People v Frohriep*, 247 Mich App 692, 703; 637 NW2d 562 (2001). Consent is valid if obtained from the person whose property is to be searched or from a third party that has common authority over the property. *Illinois v Rodriguez*, 497 US 177, 181; 110 S Ct 2793; 111 L Ed 2d 148 (1990). A co-occupant, however, can invalidate the consent given by another occupant if he is present on the premises and expressly objects to the search. *Georgia v Randolph*, 547 US 103, 106; 126 S Ct 1515; 164 L Ed 2d 208 (2006).

While a co-occupant may invalidate another co-occupant's consent in cases where the police are entering to search for evidence, a co-occupant's withdrawal

of his consent to the presence of the police does not preclude officers from continuing to investigate cases of potential domestic violence. *Randolph*, 547 US at 118-119. The United States Supreme Court emphasized that its holding in *Randolph* concerning the powers of a co-occupant to invalidate the consent of another occupant

> has no bearing on the capacity of the police to protect domestic victims. The dissent's argument rests on the failure to distinguish two different issues: when the police may enter without committing a trespass, and when the police may enter to search for evidence. No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected. [*Id*. at 118.]

Here, the officers arrived at the residence in the early morning in response to a domestic dispute, having received two calls from Kodlowski regarding disputes with defendant. With respect to defendant's retention of Kodlowski's phone, defendant suspected that Kodlowski was having an affair and he intended to check her phone to determine whether his suspicions were correct. Due to their disagreement, Kodlowski believed that it would be better to leave and discuss the issue later, but she did not want to leave the residence without her cellular telephone, and so called the police a second time. The police arrived at the residence, and after receiving consent from both defendant and Kodlowski, the officers entered the residence to assist in locating the cellular telephone. According to the offic-

ers, when they entered the house, defendant appeared angry and irritated. Little testified that defendant's mood shifted back and forth between irritated and calm. At one point, Kodlowski told the officers that, "I got somebody who will come back with me that'll knock the shit out of him." Clearly a domestic disturbance was occurring while the officers were present in the home.

Later during the incident, defendant asked the officers to leave the residence, thereby revoking his consent. However, in applying *Randolph*, we hold that defendant's withdrawal of consent was irrelevant to the Fourth Amendment analysis given that the officers were present to respond to a domestic dispute. Since the officers were present to respond to a domestic dispute, they had an obligation to investigate potential domestic violence. They were not there to search for evidence. Consequently, defendant's decision to revoke his consent did not render the officers' presence unlawful. Because defendant's Fourth Amendment rights were not violated, defendant has failed to establish plain error affecting substantial rights.

D. *PEOPLE v MORENO*

After oral argument before this Court, the Supreme Court decided *People v Moreno*, 491 Mich 38; 814 NW2d 624 (2012). Because we had some concern that *Moreno* may impact this case, we ordered supplemental briefing to address two questions: "(1) whether defendant presented (and therefore preserved for appeal) a defense to the resisting arrest charge on the basis of the polices' [sic] allegedly unlawful conduct, and (2) the effect, if any, of [*Moreno*, 491 Mich 38] to this case." *People v Kodlowski*, unpublished order of the Court of Appeals, entered June 4, 2012 (Docket No. 301774).

Turning to the first issue raised in the order, we hold that defendant failed to raise the defense that he resisted an arrest that was unlawful because the officers used excessive force, and so the *Moreno* issue has not been preserved.[10] See *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997), citing *People v Lee*, 391 Mich 618, 626-627; 218 NW2d 655 (1974), and *People v Daniels*, 163 Mich App 703, 710-711; 415 NW2d 282 (1987). At no time during trial did defendant argue that the case should be dismissed—or that he should be found not guilty— because his actions involved resisting an arrest that was made unlawful because of excessive force used by officers.[11] Nor did he attempt to raise that argument on appeal, either before or after *Moreno* was released. Just as importantly, defendant testified—and defense counsel argued to the jury—that he *never* resisted the officers. To now argue that he did resist because the arrest was unlawful is contradictory to the record and incompatible with our preservation requirements. Consequently, the issue is not preserved for appeal. *Winters*, 225 Mich App at 729.

Even though defendant never argued that he was resisting an unlawful arrest, the dissent argues that defendant should have use of *Moreno* by giving it full retroactive effect.[12] However, controlling Supreme

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[10] Defendant did argue that the police were no longer lawfully in the house at the time of his arrest, so to that extent the argument was preserved. But we have already concluded that the trial court correctly held that the officers were legally present in the home when defendant was arrested.

[11] See *People v Baker*, 127 Mich App 297, 299; 338 NW2d 391 (1983) ("Defendant did not deny that he used force to resist the arrest. Rather, he claimed that the arrest was unlawful in that the degree of force used by the officer was excessive. Those claims, if believed, would have constituted complete defenses to the charge.").

[12] In *Paul v Wayne Co Dep't of Pub Serv*, 271 Mich App 617, 620; 722 NW2d 922 (2006), our Court stated that "judicial decisions are given full

Court precedent provides that *Moreno* should only have limited retroactive application. A situation similar to that presented here was addressed by the Court in *People v Pasha*, 466 Mich 378; 645 NW2d 275 (2002). In *Pasha*, the defendant was convicted of, among other things, carrying a concealed weapon. *Id*. at 379. His conviction was upheld by our Court on the basis of *People v Marrow*, 210 Mich App 455; 534 NW2d 153 (1995), aff'd 453 Mich 903 (1996), which had held that one must lawfully possess a pistol in order to utilize the dwelling house exception contained in the carrying a concealed weapon statute, MCL 750.227(2). *Id*. at 380-381. The *Pasha* Court overruled the seven year old *Marrow* decision on the basis that it added a prerequisite to application of the statute that did not exist. *Id*. at 382-383.

Having overruled the Court of Appeals decision in *Marrow*, the *Pasha* Court then had to determine whether its ruling would apply retroactively. The Court held that because prosecutors and trial courts had relied on *Marrow* in making decisions about whether to charge or convict, applying its decision with full retroactive effect "would undermine the interest in finality of convictions and disrupt the effective administration of justice." *Id.* at 384. Hence, the Court applied its ruling to only those cases in which the defendant had raised the exception on appeal and defendant preserved the issue in the trial court or was entitled to relief under *Carines*, 460 Mich at 750. *Id*.

This same limited retroactive effect has been utilized by the Court in cases even where the issue "goes to the very heart of our jury trial system." *People v Hampton*,

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retroactive effect, i.e., they are applied to all pending cases in which the same challenge has been raised and preserved." Under this rule, *Moreno* would not apply to this case because defendant did not raise the issue.

384 Mich 669, 676; 187 NW2d 404 (1971). In *Hampton* the Court held that one of its prior decisions mandating that a jury instruction defining the consequences of a finding of not guilty by reason of insanity be read to the jury, *People v Cole*, 382 Mich 695; 172 NW2d 354 (1969), would only apply to those cases where "[t]he issue was properly preserved for appeal." *Hampton*, 384 Mich at 679.

In light of *Pasha* and *Hampton*, we conclude that *Moreno* should only apply in cases where the defendant has preserved the issue in the trial court and raised it before our Court, or if the defendant can show plain error under *Carines*. *Pasha*, 466 Mich at 384. Much like in *Pasha*, here prosecutors, defendants and trial courts across the state have relied upon *People v Ventura*, 262 Mich App 370; 686 NW2d 748 (2004), rev'd 491 Mich 38 (2012), in making decisions affecting charging, trial strategy, and determinations of guilt or innocence. To apply *Moreno* to all cases would detrimentally effect the effective administration of justice. Consequently, we employ the limited retroactive principles utilized by the *Pasha* Court. Accord *People v Lorey*, 156 Mich App 731, 734-735; 402 NW2d 84 (1986) (giving a Supreme Court decision that reversed this Court's decision limited retroactive effect and applying it only to cases in which the issue was raised in order to ensure the efficient administration of justice).

In doing so, we hold that defendant has neither raised the issue in our Court,[13] nor did he preserve the issue in the trial court. And, no plain error exists because, as previously discussed, defendant's position in the trial court was that he did not resist arrest at all,

[13] In fact, the only reason retroactivity is being addressed is because this Court *sua sponte* raised this issue by requesting briefing from the parties.

a position completely at odds with an available defense under *Moreno*. Consequently, defendant cannot show plain error.

For the reasons expressed, the circuit court's orders are affirmed.

MARKEY, P.J., concurred with MURRAY, J.

SHAPIRO, J. (*dissenting*). I respectfully dissent. After this case was tried, briefs filed and argument heard, the Supreme Court held in *People v Moreno*, 491 Mich 38; 814 NW2d 624 (2012), that a necessary element of resisting arrest is that the underlying arrest was lawful. Because no such determination was made in this case, I would reverse and remand for a new trial on that charge.

Defendant was charged with resisting the officers when they arrested him for assaulting one of the officers. Since the jury found that defendant did not assault an officer, the obvious question is whether the arrest for that alleged assault was lawful. Given the proofs, particularly the police audio recording of all the events, this is far from certain.

The officers were responding to a nonviolent argument between defendant and his wife. Defendant's attitude toward the officers, while not hostile, was sullen and unpleasant. He acted immaturely, and the officers were understandably annoyed with him. However, he had committed no crime, and it is not alleged that he committed any crime until the officers walked past defendant on their way out of the house, at which time defendant made some physical contact with Officer Michael Little. Little testified that defendant grabbed his arm and attempted to forcefully turn him around. Defendant's wife testified that she did not see

this occur, though she was within a few feet of them. Defendant testified that he merely tapped the officer on the arm to get his attention in order to tell him something before the officer left. On the audio recording, the officer is heard to say, "[D]on't touch me," and the defendant responds, "I'm sorry." Little agreed that the defendant apologized and testified that defendant was compliant and stepped back. Little also agreed that his partner, Officer Kyle Dawley, then said, "You know, fuck him, let's take him." The recording does not reveal either officer telling defendant that he was under arrest or asking him to surrender. Instead, on the recording, immediately after Dawley makes this remark, a physical altercation is heard. During that altercation, defendant was struck in the head with a baton and stunned with a Taser.

The only justification for initiating the physical contact with defendant described by the officers was the need to arrest him for the alleged assault on Little, an assault that the jury concluded did not occur. The jury rejected the officers' version of events and found more credible defendant's testimony that he merely tapped the officer on the arm in order to tell him something.[1]

The jury convicted defendant of resisting arrest, but was not instructed, as we now know it should have been, that the arrest had to have been lawful, i.e., with

[1] The majority's recitation of the facts adopts the officers' version of events as controlling our decision even though the jury rejected that version as not credible. It also ignores the wife's testimony that before any physical contact occurred, Dawley was making "bullying, sarcastic remarks" to defendant such as "You're an idiot" and "Push my buttons, just try to push my buttons." She also testified that when defendant asked the officers to leave his home, Dawley said, "Try to make me leave, just go ahead and try to make me leave" and that the altercation happened, as can be heard on the tape, a few seconds after defendant asked for the officers' badge numbers.

probable cause, for defendant's actions to constitute the crime of resisting arrest. While the question of defendant's innocence is one that must ultimately be made by a properly instructed jury, listening to the audiotape of the incident makes clear that the central question is whether the officers had probable cause to arrest, an issue that defendant's jury would not have been permitted to consider under *People* v *Ventura*, 262 Mich App 370; 686 NW2d 748 (2004).

The majority declines to address this issue, asserting that it was not properly preserved because at trial defendant did not argue that he should be acquitted because the assault arrest was unlawful. However, this argument would have been not only useless but completely inconsistent with the law as set forth in *Ventura*. The real question is not whether defendant made this then useless argument, but whether *Moreno* is to apply retroactively to all cases still pending on appeal. Clearly the answer to that question is yes, just as it was in *People v Pasha*, 466 Mich 378, 384; 645 NW2d 275 (1987), in which the Supreme Court held that a post-conviction alteration of the elements of the charged offense should be applied retroactively to those cases in which "the defendant either preserved the issue in the trial court or is entitled to relief under [*People v Carines*, 460 Mich 750; 597 NW2d 130 (1999)]." Thus, retroactive application of *Moreno* is proper when the error is plain and affected substantial rights, i.e., either resulted in conviction of an innocent defendant or otherwise seriously affected the fairness or integrity of the proceedings. *Carines*, 460 Mich at 763.

In this case, the error could not be plainer: the trial court failed to include an element of the offense in its instruction. The error affected a substantial right—the right to a jury instructed on the elements of the

offense—as well as the fairness of the proceeding. Indeed, failure to instruct the jury on an element of the offense is a form of constitutional error, *id.* at 766, and it is a structural error that undermines the entire legal process, *People v Duncan*, 462 Mich 47, 57; 610 NW2d 551 (2000). Under *Moreno*, a necessary element of resisting arrest is that the underlying arrest was lawful, and this is precisely the type of ruling that is always given retroactive effect.[2]

Defendant acted in an annoying fashion, and it is not

[2] The majority declines to apply *Moreno* despite its relevance to actual innocence because defendant did not request an instruction contrary to then settled law. This ignores the fact that requesting such an instruction could not possibly have yielded anything except the ire of the trial court given that this request would have been contrary to the unambiguous rule set forth in *Ventura*. The purpose of issue preservation is to allow the trial court to have an opportunity to consider an issue and avoid the possibility of an appellate parachute. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Neither of these interests is even remotely relevant here. First, *Ventura* was clear and controlling; there was no possibility that the trial court would have instructed the jury in plain contravention of a Court of Appeals case that was directly on point. Second, defense counsel could not have been trying to create an appellate parachute given that, at the time of trial, *Ventura* was the law and there was no reason to believe that it would be overruled in a separate case years later. Defendant was convicted on October 5, 2009. *Moreno* was not decided until April 20, 2012, a full $2^1/_2$ years after that conviction and 5 months after defendant had filed his brief on appeal.

Further, the majority's reliance on *People v Hampton*, 384 Mich 669; 187 NW2d 404 (1971) is highly attenuated. That case did not involve whether the jury was properly instructed on the actual elements of the offense, but whether the jury should have been informed that a verdict of not guilty by reason of insanity would result in the defendant's commitment to a psychiatric hospital, not freedom. Failing to advise a jury what will happen to a defendant after its verdict is far less central to a proper verdict than is informing the jury of the elements of the offense. Moreover, in *Hampton*, there was no controlling caselaw against the defendant's position as *Ventura* was in this case. Indeed, the question in *Hampton* had been "a matter of first impression" less than two years earlier in *People v Cole*, 382 Mich 695; 172 NW2d 354 (1969). *Hampton*, 384 Mich at 678.

surprising that his behavior tested the officers' patience. However, being annoying and testing an officer's patience is not a crime. No one, including police officers, may physically attack another because he or she finds that person annoying. The prosecution at oral argument noted that we expect police officers to go into unpredictable and potentially dangerous situations and asserted that we should therefore not second-guess their actions. However, it is precisely because police officers are routinely sent into such situations that they must be properly trained to maintain a professional demeanor at all times and exercise the force of the state against an individual only when there is a lawful basis to do so, not because the person is irritating or disrespectful to them personally.[3]

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[3] "[W]e have repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them." *City of Houston v Hill*, 482 US 451, 465; 107 S Ct 2502; 96 L Ed 2d 398 (1987).

BROWN v HOME-OWNERS INSURANCE COMPANY

Docket No. 307458. Submitted November 15, 2012, at Lansing. Decided December 4, 2012, at 9:05 a.m. Leave to appeal denied, 493 Mich 970.

Barry C. Brown filed an action in the Ingham Circuit Court against Home-Owners Insurance Company, seeking wage-loss benefits under MCL 500.3107(1)(b) of the no-fault act, MCL 500.5101, *et seq*. Plaintiff was injured when he slipped and fell exiting his vehicle. Prior to the accident, plaintiff was the sole employee and shareholder of Brown & Brown, a subchapter S corporation. He annually received a W-2 salary as well as the flow-through earnings from the corporation as its sole shareholder. There was no dispute that plaintiff was entitled to wage-loss benefits. Rather, the parties disagreed over whether the benefit should have been calculated on the basis of his W-2 wages only, or whether it should have also included the flow-through earnings he received through the subchapter S corporation. The parties filed competing motions for summary disposition under MCR 2.116(C)(10). The circuit court, Rosemarie E. Aquilina, J., granted plaintiff's motion and denied defendant's motion, concluding that the phrase "loss of income" under MCL 500.3107(b) entitled plaintiff to benefits on his whole income, not just on his preaccident W-2 wages. The circuit court reasoned that to do otherwise would not place plaintiff in the same position he would have been in but for the accident, which would be contrary to public policy. In addition, the court granted plaintiff's motion for attorney fees under MCL 500.3148 and for penalty interest under MCL 500.3142. Defendant appealed.

The Court of Appeals *held*:

1. Under MCL 500.3107(b) a no-fault insurer is liable to pay benefits for work loss consisting of the loss of income from work that an injured person would have performed during the first three years after the date of the accident if he or she had not been injured. The statute does not limit the benefit to an injured person's lost wages, but rather includes other sources from work as well. Although "income" is not defined in the statute, the dictionary defines it as the monetary payment received for goods or services, or from other sources, such as rents or investment revenue or receipts. The purpose of this no-fault provision is to

ensure that work-loss benefits are available to compensate injured persons for the income they would have received but for the accident. When a corporate entity has no flow-through profits, but still pays wages to an injured party, the injured party is entitled to work-loss benefits under MCL 500.3107(b) for only his or her W-2 wages. The circuit court properly determined that plaintiff, as the sole employee and shareholder of the subchapter S corporation, was entitled to work-loss benefits on the basis of both his W-2 wages and the flow-through profits he received annually from the corporation; to do otherwise would have placed him in a worse position that he would have been in had the accident not occurred.

2. Under MCL 500.3148(1), attorney fees may be awarded to a claimant in a no-fault personal injury protection insurance case if the court determines that the insurer unreasonably refused to pay the claim or unreasonably delayed a making a proper payment. For attorney fees to be awarded, the benefit must be overdue and the court must determine in a postjudgment proceeding that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment. If the lack of timeliness in payment is established, the insurer bears the burden of justifying the refusal or delay. An insurer may justify its delay or refusal to pay benefits by showing that the claim presented a legitimate question of statutory construction, constitutional law, or factual uncertainty. The trier of fact's ultimate decision that the insurer owed benefits to the claimant does not alone establish the unreasonableness of the insurer's initial decision. Rather, the court must examine the circumstances as they existed at the time the insurer made the decision, and decide whether that decision was reasonable at that time. The circuit court erred by awarding plaintiff attorney fees under MCL 500.3148. Because MCL 500.3107(b) does not define the phrase "loss of income from work," a legitimate question of statutory interpretation existed and defendant did not act unreasonably by paying plaintiff work-loss benefits only on the basis of his W-2 wages.

3. Defendant's challenge to the award of penalty interest under MCL 500.3107(1)(b) was not addressed because the circuit court order granting summary disposition in favor of plaintiff was affirmed.

Affirmed in part and reversed in part.

1. INSURANCE — NO-FAULT — WORK-LOSS BENEFITS — SUBCHAPTER S CORPORATION.

A no-fault insurer is liable to pay benefits for work loss consisting of the loss of income from work that an injured person would have performed during the first three years after the date of the

accident if he or she had not been injured; the statute does not limit the benefit to an injured person's lost wages, but rather includes other sources from work as well; a person who is the sole shareholder and sole employee of a profitable subchapter S corporation is entitled under the no-fault act to work-loss benefits on the basis of both the W-2 wages and the flow-through profits he or she received from the subchapter S corporation because to do otherwise would have placed the no-fault claimant in a worse position than he or she would have been in had the accident not occurred (MCL 500.3107[b]).

2. INSURANCE — NO-FAULT — UNREASONABLE DENIAL OF BENEFITS — ATTORNEY FEES.

The no-fault act provides for an award of attorney fees to a claimant if the court determines that the insurer unreasonably refused to pay the claim or unreasonably delayed making a proper payment; for attorney fees to be awarded, the benefit must be overdue and the court must determine in a postjudgment proceeding that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment; if the lack of timeliness in payment is established, the insurer bears the burden of justifying the refusal or delay; the insurer may justify its delay or refusal to pay benefits by showing that the claim presented a legitimate question of statutory construction, constitutional law, or factual uncertainty; the trier of fact's ultimate decision that the insurer owed benefits to the claimant does not alone establish the unreasonableness of the insurer's initial decision; the court must examine the circumstances as they existed at the time the insurer made the decision, and decide whether that decision was reasonable at that time (MCL 500.3148[1]).

Sinas, Dramis, Brake, Boughton & McIntyre, P.C. (by *George T. Sinas*, *Timothy J. Donovan*, and *Joel T. Finnell*), for Barry C. Brown.

Dykema Gossett PLLC (by *Lori McAllister*) for Home-Owners Insurance Company.

Before: BORRELLO, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM. Defendant, Home-Owners Insurance Company, appeals as of right the order denying its motion for summary disposition and granting plaintiff's

motion for summary disposition pursuant to MCR 2.116(C)(10) in this action under the no-fault act MCL 500.3101, *et seq*. Defendant also challenges the order awarding attorney fees and penalty interest to plaintiff. We affirm in part and reverse in part.

The facts of this case are not in dispute. On November 26, 2008, the 77-year-old plaintiff slipped and fell on ice while exiting his vehicle. Before the incident, plaintiff, a lawyer, was an employee of Brown & Brown, a subchapter S corporation specializing in arbitrations. The corporation was wholly owned by plaintiff.

Plaintiff has not been able to work since the incident. On May 16, 2009, plaintiff filed a claim with defendant, the insurer of his vehicle, for no-fault personal injury protection benefits. Defendant does not dispute that plaintiff is entitled to work-loss benefits pursuant to MCL 500.3107(1)(b).

Defendant submitted the information regarding plaintiff's claim for work-loss benefits to Walworth & Nayh, P.C., certified public accountants, which generated a report dated September 3, 2009. The report analyzed the work-loss claim using two different assumptions: (1) that *Ross v Auto Club Group*, 481 Mich 1; 748 NW2d 552 (2008), is applicable and that only plaintiff's W-2 wages can be considered in the calculation of wage-loss benefits, and (2) that *Ross* is not applicable and that the subchapter S distributions should also be considered in the calculation of wage loss benefits.

Defendant paid plaintiff work-loss benefits on the basis of the W-2 wages plaintiff would have received if he had continued to be an employee of Brown & Brown. Plaintiff objected to the calculation, contending that he was also entitled to work-loss benefits on the basis of

the profit the subchapter S corporation would have generated during the period of disability.

After plaintiff filed the present suit, the parties filed competing motions for summary disposition. Relevant to this appeal, the legal issue presented to the trial court was whether work-loss benefits under the no-fault act are payable only on the basis of plaintiff's W-2 wages, or whether they are payable on the basis of both W-2 wages and on the amount of flow-through earnings reported on a K-1 form that a plaintiff received as the sole shareholder of a subchapter S corporation. The parties stipulated to the material facts, including the following facts pertinent to this issue:

> (1) Barry Brown is entitled to work loss benefits pursuant to MCL 500.3107(1)(b) for the period of time subsequent to November 26, 2008 and continuing as long as he remains disabled up to and including through the third anniversary of the accident.
>
> (2) Although the parties disagree on the appropriate methodology for calculating the amount of Barry Brown's work loss benefit under MCL 500.3107(1)(b), the parties do agree that the amount of the work loss benefit is either of two numbers as calculated by Walworth and Nayh, P.C., certified public accountants, in accordance with the correspondence dated September 3, 2009 addressed to Home-Owners Insurance Company. Those numbers are:
>
> (a) $2,630.00 per 30 day period; or
>
> (b) $4,948.00 per 30 day period.
>
> (3) The determination of which of the two alternative wage loss benefit amounts applies to Mr. Brown will be based upon [the] determination of the Court following presentation of legal arguments by the parties with regard to the appropriate methodology for calculating Mr. Brown's work loss benefit under the facts and circumstances of this case.
>
> (4) Home-Owners has made work loss payments to Mr. Brown for the period of time from November 26, 2008 in the total sum of $72,063.77 through March 1, 2011.

A hearing was held on the competing motions for summary disposition on April 13, 2011. Plaintiff argued that work loss "is all of the income that was generated by his subchapter S corporation that was paid to him either as W-2 wages or - - and/or also the distributions that were paid to him as what the [Internal Revenue Service] calls pass-through income from his solely owned corporation, Subchapter S corporation." Plaintiff distinguished *Ross* on the ground that *Ross* involved an unprofitable subchapter S corporation that was not providing the plaintiff with income from distributions, whereas plaintiff's situation involved a profitable subchapter S corporation that had been providing plaintiff with income from distributions. The trial court granted summary disposition in favor of plaintiff, reasoning that

> the no fault act defines work loss benefits as consisting of loss of income from work an injured person would have performed during the first three years after the date of the accident if he or she had not been injured. And that's MCL 500.3[10]7(1)(b). The [L]egislature could have easily limited the available benefits to loss of wages or loss of W-2 wages, but they chose not to. Under the plain meaning of the statute, plaintiff is entitled to benefits based on his whole income, not benefits based solely on his preaccident W-2 wages.
>
> If I were to use defendant's reading of *Ross*, I would not put him in the same position he would have been in but for the accident. I would be putting him in a lesser position. That is contrary to public policy. It is contrary to the legislative intent. And I think it's clearly within what plaintiff's counsel read and the reasoning later stated in *Ross* about the separate existence will be respected unless doing so would subvert justice or cause a result that would be contrary to some other clearly overriding public policy.
>
> We have the no fault act to make people whole. I don't want this plaintiff to be made less than whole. For me to

> rule otherwise is to make him only partially satisfied. The Court will not do that. Therefore, it's the ruling of the Court that as to the 30 day [sic] period, the amount of lost benefit will be $4,948.

Plaintiff thereafter filed a "Motion for Penalty Interest and Attorney Fee Sanctions Pursuant to MCL 500.3142 and MCL 500.3148." In response, defendant argued that a legitimate question of statutory interpretation existed and that, therefore, attorney fees should not be awarded to plaintiff. Defendant also argued that penalty interest should not be awarded for the time period before defendant received reasonable proof of the amount and the fact of the loss. Following a hearing on August 31, 2011, the trial court entered an order granting plaintiff's motion for penalty interest and attorney fees.

On November 22, 2011, the trial court entered an order entering judgment in favor of plaintiff "for unreimbursed no-fault wage loss benefits to Plaintiff in the amount of $83,448. Plaintiff is also entitled to 12% penalty interest pursuant to MCL 500.3142 for any overdue work loss benefits commencing August 15, 2009 and continuing until paid." The court also awarded attorney fees pursuant to MCL 500.3148 in the amount of $15,000.[1]

I

Defendant first argues that the trial court erred by concluding that the profit generated by a subchapter S corporation is included in the work-loss calculation for benefits payable under MCL 500.3107(1)(b) of the no-fault act. We disagree.

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[1] The trial court stayed the proceedings pursuant to MCR 7.209(E)(1) and the stipulation of the parties.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Cadle Co v City of Kentwood*, 285 Mich App 240, 247; 776 NW2d 145 (2009). A motion for summary disposition under MCR 2.116(C)(10) may be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Campbell v Dep't of Human Servs*, 286 Mich App 230, 235; 780 NW2d 586 (2009). Similarly, "[s]tatutory interpretation is a question of law that [this Court] review[s] de novo on appeal." *Johnson v QFD, Inc*, 292 Mich App 359, 364; 807 NW2d 719 (2011).

The no-fault act allows a seriously injured person to recover work-loss damages in tort arising from the ownership, use or maintenance of a motor vehicle. See MCL 500.3135(3)(c); see also MCL 500.3107(1)(b). Section 3107(1)(b) provides in part that a no-fault insurer is liable to pay benefits for "[w]ork-loss consisting of *the loss of income from work* an injured person would have performed during the first three years after the date of the accident if he or she had not been injured." The purpose of the provision is to ensure that work-loss benefits are available to compensate injured persons for the income they would have received but for the accident. *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 152; 350 NW2d 233 (1984). In general, the no-fault act is designed to achieve the expeditious compensation of damages resulting from motor vehicle accidents and to minimize administrative delays and factual disputes.

Miller v State Farm Mut Auto Ins Co, 410 Mich 538, 568; 302 NW2d 537 (1981).

Unfortunately, the term "loss of income from work," and in particular the term "income," is not defined in the statute. In the absence of a statutory definition, it is customary to look to dictionary definitions. *Stabley v Huron-Clinton Metro Park Auth*, 228 Mich App 363, 367; 579 NW2d 374 (1998). *Random House Webster's College Dictionary* (1997) defines income as "the monetary payment received for goods or services, or from other sources, such as rents or investments; revenue; receipts." Under the term's plain meaning, it would appear that "income" is not limited only to a person's wages. Rather, the term would appear to include gains or benefits that arise from other sources as well as a result of one's "work," or labor. Accordingly, MCL 500.3107(1)(b) does not appear to limit the benefits that it provides to an injured person's lost wages, but rather includes other sources of income from work as well. Indeed, the Legislature chose the term "loss of income from work" rather than "loss of wages" as the measure of damages.

Although there is no case law directly on point involving a subchapter S corporation operating at a profit, courts have considered related issues, and their rulings are instructive. In *Coates v Mich Mut Ins Co*, 105 Mich App 290, 294; 306 NW2d 484 (1981), this Court stated that "[t]he language of [MCL 500.3107(1)(b)] would appear to preclude benefits for the loss of income consisting of return on the investment of capital, as opposed to income generated from a person's endeavors, skill, and attention." This Court noted that a self-employed sole proprietor may recover lost profits when those profits were attributable to his or her personal efforts. *Id*. at 295. This holding was

reaffirmed in *Moghis v Citizens Ins Co of America*, 187 Mich App 245, 250; 466 NW2d 290 (1990), and *Kirksey v Manitoba Pub Ins Corp*, 191 Mich App 12, 17; 477 NW2d 442 (1991). In *Adams v Auto Club Ins Ass'n*, 154 Mich App 186, 191-193; 397 NW2d 262 (1986), this Court held that reasonable business expenses be deducted from gross receipts to determine lost income and thus, the profits. This Court also noted that "[t]he goal of the no-fault act is to place individuals in the same, but no better, position than they were before their automobile accident." *Id*. at 193. The holdings in these cases suggest that the interpretation of the term "loss of income from work" as used in the no-fault act, is broader than the term "lost wages."

Defendant argues, however, that the issue of whether distributions from a subchapter S corporation are income for purposes of MCL 500.3107(1)(b) has been settled by *Ross*, 481 Mich 1. Defendant contends that in *Ross* the Court found that when the injured party is the sole employee and sole shareholder of a subchapter S corporation that is operating at a loss, the proper measure of that person's damages, for no-fault purposes, is the injured party's W-2 wages. Based on this, defendant asserts that plaintiff is entitled to work-loss benefits only on the basis of his W-2 wages and that the income plaintiff would have earned as flow-through income from the S-corporation is irrelevant to the calculation of plaintiff's benefits.

The Court in *Ross* held that the plaintiff was "entitled to work-loss benefits based on his wages," *Ross*, 481 Mich at 8, and that " 'the business expenses of the corporation [were] irrelevant in calculating [the] plaintiff's wage loss . . . .' " *Ross*, 481 Mich at 8, quoting with approval from this Court's analysis in *Ross* v *Auto Club Group*, 269 Mich App 356, 362; 711 NW2d 787 (2006).

However, *Ross* is distinguishable from the facts of this case. While *Ross* concerned the calculation of work-loss benefits for an individual who was the sole employee and sole shareholder of a subchapter S corporation, the issue in *Ross* was "whether someone can recover work-loss benefits under MCL 500.3107(1)(b) if he or she is the sole employee and shareholder of a subchapter S corporation *that lost more money than it paid in wages*. *Ross*, 481 Mich at 7 (emphasis added). The Court held that when the corporate entity had no income to flow through to the injured party, but still paid wages to the injured party, the injured party was entitled to work-loss benefits and that the measure of those benefits was the amount of the injured party's W-2 wages. *Id*. at 9-10.

Defendant contends that the Court's holding that the measure of wage-loss benefits is the amount of the injured party's W-2 wages applies regardless of whether the subchapter S corporation is operating at a profit. Nothing in the Court's holding in *Ross* suggested that the Court intended its holding to extend beyond the specific factual situation presented in that case as defendant suggests. The Court noted that this Court had reached the right result for the right reason and clearly left open the possibility that under different circumstances its ruling might be different. The Supreme Court also quoted with approval this Court's reasoning in Ross, which noted that "[a corporation's] separate existence will be respected, unless doing so would subvert justice or cause a result that would be contrary to some other clearly overriding public policy." *Ross*, 481 Mich at 8, quoting *Ross*, 269 Mich App at 261 (citation and quotation marks omitted). The Court explicitly noted that the defendant in that case had not presented any evidence that would justify disregarding the above rule and, accordingly, found that the Court was required to respect the separate corporate existence

in determining the plaintiff's entitlement to work-loss benefits. *Ross*, 481 Mich at 8, quoting *Ross*, 269 Mich App at 262.

In *Ross*, because the plaintiff's subchapter S corporation was operating at a loss, there was no income distribution other than the W-2 wages the plaintiff had received. The holding in *Ross*, therefore, is limited to those situations in which the claimant's subchapter S corporation is operating at a loss. Nowhere in *Ross* does the Court say loss of income is limited to W-2 wages for a sole shareholder of a profitable subchapter S corporation. Thus, *Ross* is distinguishable from the facts in this case.

In the present case, plaintiff has presented evidence justifying the setting aside of the separate corporate existence of his business. Under the circumstances in this case where the subchapter S corporation was operating at a profit and where plaintiff was receiving and paying tax on flow-through income from the corporation, to not treat all income as loss of income from work would have the result of placing plaintiff in a worse position than he would have been in had the accident not occurred. That result would be inconsistent with the overall purpose of the no-fault act, "to place individuals in the same, but no better, position than they were before their automobile accident." *Adams*, 154 Mich App at 193.

II

Defendant asserts that the trial court erred when it awarded plaintiff attorney fees pursuant to MCL 500.3148(1), because a legitimate question of statutory interpretation existed. We agree.

A trial court's decision to grant or deny a motion for attorney fees presents a mixed question of fact and law.

Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich, 279 Mich App 691, 693; 760 NW2d 574 (2008). This Court reviews the trial court's findings of fact for clear error, and questions of law de novo. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296; 769 NW2d 234 (2009) (citation and quotation marks omitted). However, this Court reviews for an abuse of discretion a trial court's ultimate decision whether to award attorney fees. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.*

In no-fault personal injury protection insurance cases, MCL 500.3148(1) permits a claimant to obtain attorney fees from an insurer "if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment."

In *Moore* v *Secura Ins*, 482 Mich 507, 517; 759 NW2d 833 (2008), the Supreme Court noted:

> MCL 500.3148(1) establishes two prerequisites for the award of attorney fees. First, the benefits must be overdue, meaning "not paid within 30 days after [the] insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(2). Second, in postjudgment proceedings, the trial court must find that the insurer "unreasonably refused to pay the claim or unreasonably delayed in making proper payment." MCL 500.3148(1).

If a claimant establishes the first prerequisite, a rebuttable presumption arises regarding the second. *Attard v*

Citizens Ins Co of America, 237 Mich App 311, 317; 602 NW2d 633 (1999). The insurer then bears the burden of justifying the refusal or delay. *Id.*

An insurer may justify its refusal to pay a claimant benefits by showing that the claim presented a legitimate question of statutory construction, constitutional law, or factual uncertainty. *Univ Rehab Alliance*, 279 Mich App at 694. The trier of fact's ultimate decision that the insurer owed benefits to the claimant does not alone establish the unreasonableness of the insurer's initial decision. *Id.; Moore*, 482 Mich at 522. Rather, the court must examine the circumstances as they existed at the time the insurer made the decision, and decide whether that decision was reasonable at that time. *Univ Rehab Alliance*, 279 Mich App at 694.

In this case the trial court, after listening to arguments at the hearing on the motion for attorney fees, simply ruled that "Defendant owes . . . the actual attorney fees pursuant to . . . MCL 500.3148 of the Michigan No-Fault statute." Although the trial court had granted plaintiff's motion for summary disposition, signaling its view that he had proper grounds for benefits, when ruling on the motion for attorney fees the trial court made no findings of fact and provided no analysis with regard to whether the delay in paying the full amount of work-loss benefits was unreasonable. We can infer, however, that the trial court implicitly concluded that a legitimate dispute concerning the statutory requirements did not exist. We disagree with this conclusion. Given the lack of definition of the phrase "loss of income from work," and in particular the term "income," in MCL 500.3107(1)(b), a legitimate question of statutory interpretation existed, particularly in light of the *Ross* Court's calculation of work-loss benefits for an individual who was the sole employee and sole

shareholders of a subchapter S corporation. Under these circumstances, we conclude that defendant did not act unreasonably by paying plaintiff work-loss benefits based upon his W-2 income. Consequently we reverse that part of the order awarding plaintiff attorney fees under MCL 500.3148(1).

III

Defendant argues that the award of penalty interest under MCL 500.3142 should be reversed in the event that this Court reverses the trial court's conclusion that the profit generated by a subchapter S corporation is included in the work-loss calculation for benefits payable under MCL 500.3107(1)(b). In light of our conclusion that the trial court properly concluded that the profit generated by a subchapter S corporation is included in the work-loss calculation for benefits payable under MCL 500.3107(1)(b), we need not address this issue.

Affirmed in part and reversed in part. Because neither side prevailed in full, neither side shall tax costs.

BORRELLO, P.J., and FITZGERALD and OWENS, JJ., concurred.

BONNER v CITY OF BRIGHTON

Docket No. 302677. Submitted April 3, 2012, at Detroit. Decided December 4, 2012, at 9:10 a.m. Leave to appeal granted, 493 Mich ___.

Leon V. and Marilyn E. Bonner filed an action against the city of Brighton in the Livingston Circuit Court, claiming that the city's order under Brighton Code of Ordinances (BCO), § 18-59, to demolish certain of their residential structures violated, in part, their procedural and substantive due process rights. BCO 18-59 states that if a structure is determined unsafe and that the cost of the repairs would exceed 100 percent of the true cash value of the structure before it was deemed unsafe, the repairs are presumed unreasonable, and the structure is presumed to be a public nuisance which may be ordered demolished without option on the part of the owner to repair. The city notified plaintiffs of the structures' various defects and code violations, informed plaintiffs that the structures had been deemed unsafe as defined in the BCO, were presumed to be a public nuisance and ordered them to demolish the structures within 60 days with no option to repair. Plaintiffs appealed the determination to the city council in accordance with the BCO. Following an evidentiary hearing at which both parties submitted evidence, the city council concluded that the residential buildings constituted unsafe structures for purposes of the BCO, that the structures were unreasonable to repair because the cost of the needed repairs would exceed 100 percent of the structures' true cash values before they became unsafe, and ordered plaintiffs to demolish them within 60 days, which plaintiff did not. The city then filed a competing action in the circuit court, seeking an order enforcing BCO 18-59 and requiring the structures to be demolished. The court, Michael P. Hatty, J., denied the city's preliminary injunction request, and granted plaintiffs partial summary disposition, concluding that BCO 18-59 violated substantive due process on its face because it precluded property owners from having the opportunity to repair their property. The circuit court denied the city's motion for reconsideration, and the Court of Appeals granted the city's application for leave to appeal.

The Court of Appeals *held*:

1. The Due Process Clauses of the United States and Michigan Constitutions, US Const, Am XIV, and Const 1963, art 1, § 17, include procedural and substantive components. Substantive due process protects individual liberty and property interests from arbitrary government actions regardless of the fairness of any implementing procedures. The right to substantive due process is violated when legislation is unreasonable and clearly arbitrary, having no substantial relationship to the health, safety, morals, and general welfare of the public. A violation is established only when the governmental conduct is so arbitrary and capricious as to shock the conscience. It is a permissible legislative objective for a city to demolish unsafe and dangerous structures to protect its citizens. BCO 18-59 creates a rebuttable presumption that repairs to an unsafe structure would be unreasonable if the costs would exceed 100 percent of the true cash value of the structure before it was deemed unsafe. The code section violates substantive due process because it arbitrarily and unreasonably denies a property owner the option to repair an unsafe structure rather than ordering demolition with no option to repair simply on the basis that the city deems repair efforts to be economically unreasonable. Because abatement of the public nuisance can be attained through either repairs to or demolition of the house, the repair restriction in BCO 18-59 has no reasonable relation to the public welfare and violates substantive due process.

2. Procedural due process requires that a person may not be deprived of his or her life, liberty, or property without due process of law. A violation occurs when the government unlawfully interferes with a protected property or liberty interest without providing adequate procedural safeguards. A procedural due process claim is established by showing that a recognizable property or liberty interest was deprived under the color of state law without due process of law. The procedures that are constitutionally required in a particular fact situation are determined by examining (1) the private interest affected by the governmental action, (2) the risk of an erroneous deprivation of the interest under existing procedure and the value of additional safeguards, and (3) the adverse impact on the government of requiring additional safeguards, including the consideration of fiscal and administrative burdens. Although the circuit court did not address this issue, plaintiffs' arguments contained procedural due process elements which the Court of Appeals chose to address. In addition to the notice, hearing, and an impartial decision-maker provided by the BCO before a final demolition order, procedural due process

required that plaintiffs be provided a reasonable opportunity to repair the unsafe structure, regardless of whether doing so might be viewed as economically unreasonable. The code's requirement that a property owner must demonstrate the reasonableness of the repairs to rebut the presumption of unreasonableness violates procedural due process because the ordinance does not place constraints on the unfettered discretion of the city council in its review of the demolition order and the city council must use the same economic reasonableness presumption for unsafe structures in its review.

Affirmed.

MURRAY, J., dissenting, would have reversed the circuit court order that granted partial summary disposition to plaintiffs. He would have concluded that BCO 18-59 did not violate substantive due process because there are circumstances, such as when the structure is unsafe due to a weather-related incident, under which the ordinance allows repairs to be made even though deemed unreasonable through application of the reasonableness presumption. The presumption of demolition if the repair costs exceed 100 percent of the structure's true cash value is neither arbitrary nor unreasonable because it is not an absolute prohibition on making repairs. Because the circuit court did not rule on the procedural due process claim, the majority should not address it. Even if the issue was properly before the court, there was no procedural due process violation because the ordinance required, and plaintiffs received, notice of the demolition order, an opportunity to be heard at a hearing challenging the order, and an impartial decision-maker reviewing the decision.

1. CONSTITUTIONAL LAW — DUE PROCESS — SUBSTANTIVE DUE PROCESS — UNSAFE STRUCTURES — DEMOLITION ORDERS — REPAIRS.

Substantive due process protects individual liberty and property interests from arbitrary government actions regardless of the fairness of any implementing procedures; the right to substantive due process is violated when legislation is unreasonable and clearly arbitrary, having no substantial relationship to the health, safety, morals, and general welfare of the public; it is a permissible legislative objective for a city to demolish unsafe and dangerous structures to protect its citizens; a zoning code section violates substantive due process if it arbitrarily and unreasonably denies a property owner the option to repair an unsafe structure rather than ordering demolition with no option to repair simply on the basis that the city deems repair efforts to be economically unreasonable (US Const, Am XIV; Const 1963, art 1, § 17).

2. CONSTITUTIONAL LAW — DUE PROCESS — PROCEDURAL DUE PROCESS — UNSAFE STRUCTURES — REPAIRS.

Procedural due process requires that a person may not be deprived of his or her life, liberty, or property without due process of law; a procedural due process violation occurs when the government unlawfully interferes with a protected property or liberty interest without providing adequate procedural safeguards; a procedural due process claim is established by showing that a recognizable property or liberty interest was deprived under the color of state law without due process of law; before a governmental body issues an order to demolish an unsafe structure, property owners must be given an option to repair the unsafe structure, regardless of whether doing so might be viewed as economically unreasonable (US Const, Am XIV; Const 1963, art 1, § 17).

Essex Park Law Office, P.C. (by *Dennis B. Dubuc*), and *John M. Shureb* for Leon V. and Marilyn E. Bonner.

Law Office of Paul E. Burns (by *Paul E. Burns* and *Bradford L. Maynes*) and *Michael M. Wachsberg* for the city of Brighton.

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

MARKEY, P.J. Defendant-counterplaintiff, city of Brighton (the city), appeals by leave granted the trial court's order granting partial summary disposition in favor of plaintiffs. The trial court determined that § 18-59 of the Brighton Code of Ordinances (BCO) violates substantive due process when it permits the city to have an unsafe structure demolished as a public nuisance, without providing the owner the option to repair it, if the structure is deemed unreasonable to repair, which is presumed when repair costs would exceed 100 percent of the structure's true cash value as reflected in the assessment tax rolls before the structure became unsafe. We interpret the ordinance as only allowing the exercise of an option to repair when a property owner overcomes or rebuts

the presumption of unreasonableness by proving that it is economical to do so, regardless of whether the property owner is otherwise willing and able to timely make the necessary repairs. We conclude that this standard is arbitrary and unreasonable. We additionally find that while police powers generally allow the demolition of unsafe structures to achieve the legitimate legislative objective of keeping citizens safe and free from harm, the ordinance's exclusion of a repair option when city officials deem the repairs unreasonable on the basis of expenses that the owner is able and willing to incur bears no reasonable relationship to the legislative objective. This is true because demolition does not advance the objective of abating nuisances and protecting citizens to a greater degree than repairs, even unreasonable ones. Therefore, we hold that the ordinance violates substantive due process. Moreover, by not providing a procedure to safeguard an owner's right to retain property by performing what others might consider unreasonably expensive repairs, which would burden the city to a lesser extent than demolition, the city's ordinance violates procedural due process. Accordingly, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs own two residential properties located in downtown Brighton. There is a house on one parcel of property and a house with a garage or barn on the other. According to the city, the three structures have been unoccupied and largely ignored and unmaintained for over 30 years, representing the most egregious instances of residential blight in Brighton. The city's building and code enforcement official (hereafter "building official") informed plaintiffs in a letter that

the structures on the two properties constituted unsafe structures under the BCO[1] and public nuisances under Michigan common law. The building official cited a litany of alleged defects and code violations in regard to the condition of the structures. Plaintiffs were further informed that it had been determined that it was unreasonable to repair the structures as defined in BCO § 18-59, which provides in relevant part as follows:

> Whenever the city manager, or his designee, has determined that a structure is unsafe and has determined that the cost of the repairs would exceed 100 percent of the true cash value of the structure as reflected on the city assessment tax rolls in effect prior to the building becoming an unsafe structure, such repairs shall be presumed unreasonable and it shall be presumed for the purpose of this article that such structure is a public nuisance which may be ordered demolished without option on the part of the owner to repair.

Plaintiffs were ordered to demolish the structures with no option to repair within 60 days.

Plaintiffs appealed the determination to the city council pursuant to BCO § 18-61, which provides in pertinent part:

> An owner of a structure determined to be unsafe may appeal the decision to the city council. The appeal shall be in writing and shall state the basis for the appeal. . . . The owner or his agent shall have an opportunity to be heard by the city council at a regularly scheduled council meeting.

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[1] BCO § 18-46 defines an "unsafe structure," setting forth a number of qualifying criteria. BCO § 18-47 makes it "unlawful for an owner or agent to maintain or occupy an unsafe structure." BCO § 18-48 requires those responsible for a structure to "take all necessary precautions to prevent any nuisance or other condition detrimental to public health, safety, or general welfare from arising thereon."

> The city council may affirm, modify, or reverse all or part of the determination of the city manager, or his designee.

In preparation for the appeal, plaintiffs retained a structural engineer and various contractors to determine the repairs necessary to bring each structure into compliance with the applicable building codes. Plaintiffs subsequently filed affidavits signed by their retained engineer and contractors that addressed the condition of the structures relative to their professional field and provided cost estimates with respect to the proposed repairs. These individuals prepared drawings and repair plans and asserted that the structures were safe, structurally sound, and readily repairable. At a hearing before the city council, plaintiffs agreed to provide the building official with an expert's report and to allow city personnel access to the structures for purposes of exterior and interior inspections. The city council tabled the appeal pending the inspections. Subsequently, plaintiffs authorized their contractors to commence some repairs, and applications for building permits were submitted to the city. In a letter to plaintiffs, the building official denied the building-permit applications and accused plaintiffs of refusing to allow inspections of the structures and of failing to provide their expert's report, contrary to plaintiffs' agreement at the city council hearing. The building official also noted that the city had the right to inspect property before granting permits. Because they were denied building permits, plaintiffs did not complete any repairs.[2] Plaintiffs' alleged lack of cooperation and failure to abide by their agreements resulted in the building official obtaining administrative search warrants for

[2] A stop-work order was posted as to any repairs that may have been contemplated or initiated.

the properties. The search warrants authorized a search, inspection, and examination of the interior and exterior of each structure to determine whether they were in compliance with applicable laws, codes, and ordinances. After inspecting the structures pursuant to the administrative search warrants, the city's inspectors and experts identified extensive defects and code violations, requiring numerous repairs and the replacement of certain structural features. When litigation commenced, the city filed affidavits by these individuals. In communications to plaintiffs and the city council, the building official reiterated his position that the structures were unsafe, BCO § 18-46, that it would be unreasonable to repair them, BCO § 18-59, and that therefore, demolition was required.

The pending appeal to the city council was resumed, and hearings were conducted in which the council received the reports of inspectors, contractors, engineers, and other experts, along with written repair estimates, PowerPoint presentations, testimony, and oral arguments. The building official and his experts opined that the total cost to bring the structures up to code was approximately $158,000. The city determined the cash value of the structures at approximately $85,000. One of plaintiffs' experts opined that it would cost less than $40,000 per house to make the necessary repairs and bring the structures up to code.

In Resolution 09-16, Decision on Appeal, the city council adopted the findings set forth in the building official's inspection reports, accepted his repair estimates and agreed with the oral testimony and PowerPoint presentations the building official introduced. The city council determined that plaintiffs' reports and

cost estimates lacked credibility and that the structures had lost their status as nonconforming, single-family residential uses. The council concluded that the structures constituted "unsafe structures" under BCO § 18-46, that plaintiffs were in violation of BCO § 18-47 by owning and maintaining unsafe structures, and that the structures were unreasonable to repair and must be demolished under BCO § 18-59. The city council ordered plaintiffs to demolish the structures within 60 days.

Plaintiffs did not take any steps toward demolishing the structures within the 60-day period. Shortly before the 60-day period was set to expire, plaintiffs filed the instant action against the city, alleging, in a first amended complaint, a violation of procedural and substantive due process, a violation of equal protection, inverse condemnation or a regulatory taking, contempt of court, common-law and statutory slander of title, and a violation of Michigan housing laws under MCL 125.540.[3] Plaintiffs' constitutional challenges were predicated on the United States Constitution, 42 USC 1983, and the Michigan Constitution. After the complaint was filed, the city's building official, under the authority of BCO § 18-58, issued plaintiffs an order to show cause to appear before the city council where they would have the opportunity to present testimony and evidence as to why the structures should not be demolished. The order to show cause set forth an exhaustive list of defects and problems associated with the structures that rendered them "unsafe." The city council conducted a show-cause hearing in which plaintiffs participated. The council rejected plaintiffs' position

[3] Before the complaint in the case at bar was filed, plaintiffs had commenced a mandamus action against the city, which the trial court dismissed.

against demolition.[4] Again, the show-cause proceedings occurred after the lawsuit was commenced.

The city subsequently filed its own complaint in a separate action, requesting injunctive relief in the form of an order enforcing BCO § 18-59 and requiring demolition of the structures. The trial court consolidated the cases. Plaintiffs filed a motion for partial summary disposition with respect to their complaint, arguing that BCO § 18-59 was unconstitutional. The trial court denied the motion on procedural grounds, concluding that plaintiffs were required, but failed to submit, documentary evidence.[5] The trial court also denied the city's request for a preliminary injunction to demolish the structures, which the court found to be an improper

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[4] In Resolution 09-26, the city council found that "the testimony and evidence presented [was] insufficient to show cause why the structure[s] should not be demolished for the reasons that that testimony and evidence was irrelevant and/or not credible, and that [plaintiffs] have, accordingly, not fulfilled their burden of proof." Resolution 09-26, in its written form, further indicated that plaintiffs were to be given approximately six months to "take any and all actions necessary to bring the [s]tructures into compliance with the 2006 Michigan Building Code." We note, however, that a transcript of the hearing in which the resolution was announced, recited, voted upon, and approved fails to include this provision. Resolution 09-26, in its written form, additionally authorized the city attorney to institute appropriate legal proceedings to seek demolition of the structures if the work was not completed in timely fashion. The transcript of the hearing, however, reflects that the council authorized the city attorney to immediately pursue legal proceedings seeking demolition. The transcript also indicates that two resolutions were prepared before the hearing: one that authorized litigation and one that authorized an "extension for repair." Given the surrounding circumstances and the events that transpired, it is clear that the city council did not allow plaintiffs an opportunity to make repairs. Evidently, after the hearing, the council mistakenly executed the wrong resolution.

[5] We note that the trial court granted partial summary disposition to the city on its motion relative to plaintiffs' claims for money damages based on a violation of the Michigan Constitution and in regard to the contempt of court and slander of title. Additionally, plaintiffs agreed to the dismissal of their claim under MCL 125.540 (enforcement agency's notice requirements for dangerous conditions).

request given the entirety of the proceedings pending before the court. Throughout the litigation, plaintiffs filed numerous motions seeking court authorization to make various repairs and to abate the alleged public nuisances. The motions were denied, although the court did permit plaintiffs to place a tarp on a roof and to close open and obvious access points. Eventually, plaintiffs renewed their motion for partial summary disposition, again arguing that BCO § 18-59 was unconstitutional on a variety of grounds, including a claim that the ordinance violated substantive due process. The trial court rejected plaintiffs' argument that BCO § 18-59 was unconstitutional because it constituted an improper delegation of legislative authority, and the court found that issues of fact existed on the constitutional argument that application of BCO § 18-59 resulted in a taking without just compensation. The trial court also ruled, however, that BCO § 18-59, on its face, violated substantive due process.[6]

The trial court determined that BCO § 18-59 violated substantive due process because it precluded property owners from having the opportunity to repair their property, which served no rational interest or purpose, was entirely arbitrary, and shocked the conscience. The trial court agreed with the city that the demolition of unsafe structures promoted the legitimate interest of public health and safety; however, that interest, the court stated, was not advanced by denying a property owner the chance to repair an unsafe structure. The court observed that if the owner repaired a structure and brought it up to code, the health and safety of the

[6] Plaintiffs presented, and the trial court ruled upon, myriad arguments on several subjects in the motion for partial summary disposition; however, we shall not address them as only the constitutionality of BCO § 18-59 is at issue on appeal.

public would be advanced. The trial court reasoned that the interest in the public's health and safety is equally advanced by demolition and by owner repairs that satisfy city standards. The court determined that giving a landowner an opportunity to repair his or her property would not inhibit a municipality's ability to protect the public health and safety. The trial court also indicated that Michigan law required giving a property owner a chance to repair prior to a demolition conducted for safety reasons. The court noted that there was an abundance of persuasive authority from other jurisdictions that found similar ordinances withholding the option to repair advanced no rational purpose and were arbitrary. The trial court concluded that the city "must cure this defect in the ordinance and must reissue a new demolition order under the revised ordinance before proceeding with any demolition of the properties." The court denied the city's motion for reconsideration. This Court granted the city's application for leave to appeal.

II. ANALYSIS

A. STANDARD OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). We also review de novo constitutional issues as well as questions concerning the proper construction of an ordinance. *Kyser v Kasson Twp*, 486 Mich 514, 519; 786 NW2d 543 (2010).

When reviewing an ordinance, we apply the same rules applicable to the construction of statutes. *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396, 407; 761 NW2d 371 (2008). "The goal of statutory construction, and thus of construction and interpreta-

tion of an ordinance, is to discern and give effect to the intent of the legislative body." *Id.* at 407-408. The words used by the legislative body provide the most reliable evidence of its intent. *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004). Unless otherwise defined, we assign the words in a municipal ordinance their plain and ordinary meanings, *Great Lakes Society*, 281 Mich App at 408, avoiding an interpretation that would render any part of an ordinance surplusage or nugatory, *Zwiers v Growney*, 286 Mich App 38, 44; 778 NW2d 81 (2009). Also, unless a different intent is manifest, the language used by the legislative body must be understood and read in its grammatical context. *Shinholster*, 471 Mich at 549. The legislative body is deemed to have intended the meaning clearly expressed in an ordinance's unambiguous language, which must be enforced as written. *Id.* " 'A necessary corollary of these principles is that a court may read nothing into an unambiguous [ordinance] that is not within the manifest intent of the [legislative body] as derived from the words of the [ordinance] itself.' " *Zwiers*, 286 Mich App at 44 (citation omitted).

B. CONSTITUTIONAL DUE PROCESS PRINCIPLES

The state and federal constitutions guarantee that no person shall be deprived of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17; *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). "Procedure in a particular case is constitutionally sufficient when there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker." *Id*. And, although the text of the Due Process Clauses provides only procedural protections, due process also has a substantive component that protects individual liberty

and property interests from arbitrary government actions regardless of the fairness of any implementing procedures. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 370; 803 NW2d 698 (2010); *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 197; 761 NW2d 293 (2008). The right to substantive due process is violated when legislation is unreasonable and clearly arbitrary, having no substantial relationship to the health, safety, morals, and general welfare of the public.[7] *Lingle v Chevron USA, Inc*, 544 US 528, 541; 125 S Ct 2074; 161 L Ed 2d 876 (2005). In the context of government actions, a substantive due process violation is established only when "the governmental conduct [is] so arbitrary and capricious as to shock the conscience." *Mettler Walloon*, 281 Mich App at 198; see also *In re Beck*, 287 Mich App 400, 402; 788 NW2d 697 (2010), aff'd 488 Mich 6 (2010).

In *Kropf v Sterling Hts*, 391 Mich 139, 157; 215 NW2d 179 (1974), our Supreme Court discussed a substantive due process claim in the context of a zoning ordinance, stating:

> A plaintiff-citizen may be denied substantive due process by the city or municipality by the enactment of legislation, in this case a zoning ordinance, which has, in the final analysis, no reasonable basis for its very existence. The power of the city to enact ordinances is not absolute. It has been given power by the State of Michigan to zone and regulate land use within its boundaries so that the inherent police powers of the state may be more effectively implemented on the local level. But the state cannot confer upon the local unit of government that which it does not

[7] We note that this case presents a facial challenge to the ordinance. See *Hendee v Putnam Twp*, 486 Mich 556, 568 n 17; 786 NW2d 521 (2010) (distinguishing between facial and as-applied challenges and noting that a facial challenge attacks the very existence of an ordinance as infringing upon property rights).

> have. For the state itself to legislate in a manner that affects the individual right of its citizens, the state must show that it has a sufficient interest in protecting or implementing the common good, via its police powers, that such private interests must give way to this higher interest.

A citizen is entitled to due process of law when a municipality, exercising its police power, enacts an ordinance that affects the citizen's constitutional rights. *Kyser*, 486 Mich at 521. In determining whether an ordinance enacted by a municipality comports with due process, the test employed is whether the ordinance bears a reasonable relationship to a permissible legislative objective. *Id.* When a municipal ordinance restricts the use of property, the issue is whether the exercise of authority entails an undue invasion of private constitutional rights without a reasonable justification in connection with the public welfare. *Id.* We begin with the presumption that an ordinance is reasonable and thus constitutionally compliant. *Id.* "[T]he burden is upon the person challenging . . . an ordinance to overcome this presumption by proving that there is no reasonable governmental interest being advanced by the zoning ordinance." *Id*. The property owner must demonstrate that the challenged ordinance arbitrarily and unreasonably affects the owner's use of his or her property. *Id*. An ordinance does not offend the Due Process Clause when it satisfies the reasonableness test; the ordinance must be reasonable or reasonably necessary for purposes of preserving the public health, morals, or safety.[8] *Id.* at 523, 529. An ordinance will be declared unconsti-

[8] The *Kyser* Court explained that while the standard of review for zoning regulations is characterized as a "reasonableness" test, it is analogous to the "rational basis" test for testing the constitutionality of legislation not involving suspect classifications or fundamental rights to which courts apply heightened or strict scrutiny. *Kyser*, 486 Mich at 522 n 2.

tutional only if it constitutes an arbitrary fiat or a whimsical ipse dixit, leaving no legitimate dispute regarding its unreasonableness. *Id*. at 521-522.

Although the trial court's ruling and the arguments of the parties are framed in the context of substantive due process, we find that the nature of the issues presented in this case also implicate procedural due process. The principle espoused by plaintiffs is that a property owner has the right, or must have the option or opportunity, to make repairs to a structure deemed unsafe by a municipality before the structure can be demolished or razed. Plaintiffs do not contend that the city lacks the general authority to demolish unsafe or dangerous structures; they instead argue that a property owner must be afforded the opportunity to repair an unsafe structure before the city orders it demolished. Plaintiffs' argument contains elements of procedural due process requiring notice, hearing, and a ruling by an impartial decision-maker, before the government infringes constitutionally protected property interests.

"In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Zinermon v Burch*, 494 US 113, 125; 110 S Ct 975; 108 L Ed 2d 100 (1990). " 'Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.' " *Id*. at 125-126 (citation omitted). Procedural due process differs from substantive due process in that "procedural due process principles protect persons from deficient procedures that lead to the deprivation of cognizable [property] interests." *Bartell v Lohiser*, 215 F3d 550, 557 (CA 6, 2000). A procedural due

process violation occurs when the government unlawfully interferes with a protected property or liberty interest without providing adequate procedural safeguards. *Schiller v Strangis*, 540 F Supp 605, 613 (D Mass, 1982). To establish a violation of procedural due process, one must show that the action concerned a recognizable property or liberty interest, that there was a deprivation of that interest absent due process of law, and that the deprivation took place under the color of state law. *Id.* "A 'substantive due process' claim is, fundamentally, not a claim of procedural deficiency, but, rather, a claim that the state's conduct is inherently impermissible." *Id.* at 614.[9]

In *D&M Fin Corp v City of Long Beach*, 136 Cal App 4th 165, 174; 38 Cal Rptr 3d 562 (2006), the California Court of Appeal stated that "[w]hen a city threatens to demolish structures, due process requires that the city provide the property owner and other interested parties with notice, with the opportunity to be heard, and with the opportunity to correct or repair the defect before demolition." And, in *Hawthorne S & L Ass'n v City of Signal Hill*, 19 Cal App 4th 148, 159; 23 Cal Rptr 2d 272 (1993), quoting *Miles v Dist of Columbia*, 166 US App DC 235, 239; 510 F2d 188, 192 (1975), the court opined:

> "A municipality in the exercise of its police power may, without compensation, destroy a building or structure that is a menace to the public safety or health. However, that municipality must, before destroying a building, give the owner sufficient notice, a hearing and ample opportunity to demolish the building himself or to do what suffices to

[9] In contrast to procedural due process, substantive due process protects individual liberty and property interests from arbitrary government actions regardless how fairly implemented. *People v Sierb*, 456 Mich 519, 523; 581 NW2d 219 (1998); *Mettler Walloon*, 281 Mich App at 197.

> make it safe or healthy; such a procedure is the essence of the governmental responsibility to accord due process of law."

Plaintiffs' position in this case that the ordinance denies them the right or an opportunity to repair prior to demolition can be equated to an argument that the ordinance lacks a necessary procedural safeguard or that it is procedurally deficient or inadequate. Plaintiffs do not contend that demolition of an unsafe structure is unlawful even when an option to repair is extended to the property owner by the municipality. Rather, plaintiffs' position is that a deprivation of a property interest by way of demolition is unjustified *if* an opportunity to correct any structural defects is not made available. Plaintiffs do not take the stance that demolition of unsafe structures is inherently impermissible. To some extent, the mere manner in which the issue is framed bears on whether plaintiffs' claim is one of substantive or procedural due process. Plaintiffs certainly contend that the demolition of unsafe structures "without a sound repair option" is inherently impermissible. As the court in *Schiller*, 540 F Supp at 614, noted, "[T]he line dividing 'procedural due process' from 'substantive due process' is not always bright, [and] it may be difficult in some cases to determine which is the proper characterization of the plaintiff's claim." Ultimately, we conclude that the ordinance infringes on plaintiffs' due process rights, whether denominated procedural or substantive, thereby making it unnecessary to determine which due process principle is actually embodied in plaintiffs' argument.

C. DISCUSSION

We first carefully examine the language of BCO § 18-59 to determine and define its scope, its require-

ments, and its proper implementation. Again, BCO § 18-59, which is titled "Unreasonable repairs," provides in relevant part as follows:

> Whenever the city manager, or his designee, has determined that a structure is unsafe and has determined that the cost of the repairs would exceed 100 percent of the true cash value of the structure as reflected on the city assessment tax rolls in effect prior to the building becoming an unsafe structure, such repairs shall be presumed unreasonable and it shall be presumed for the purpose of this article that such structure is a public nuisance which may be ordered demolished without option on the part of the owner to repair.[10]

Accordingly, there must be an initial determination that a structure is indeed unsafe, and the definition of an "unsafe structure" is found in BCO § 18-46. The city's building official determined that the structures were unsafe under BCO § 18-46, and plaintiffs do not debate that conclusion for purposes of this appeal. Next, there must be a determination, which the building official in this case made as to all buildings, that the repair costs would exceed the true cash value of a structure as reflected in past assessment tax rolls when the structure was not characterized as unsafe. Once a determination is made that an unsafe structure exists and that the cost to repair exceeds the structure's value

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[10] Under BCO § 18-52(a) and (b), the city must issue and serve a notice on an owner of a structure, or the owner's agent, that reflects a determination that the owner's structure is unsafe. BCO § 18-52(c)(3) provides that the notice must "[s]pecify the repairs and improvements required to be made to render the structure safe *or if the city manager, or his designee, has determined the structure cannot be made safe, indicate that the structure is to be demolished*[.]" (Emphasis added.) In situations in which the city allows an opportunity to repair an unsafe structure, the notice must "[s]pecify a reasonable time within which the repairs and improvements must be made or the structure must be demolished." BCO § 18-52(c)(4).

before it became unsafe, it is *presumed* that the repairs are unreasonable and that the structure is a public nuisance subject to demolition without the option to repair. Therefore, the ordinance does not definitively establish the unreasonableness of repairs, the existence of a public nuisance, and the authority to order demolition without option to abate the nuisance and repair the structure. Rather, the ordinance merely gives rise to these presumptions.[11]

"Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption." Black's Law Dictionary (8th ed). For purposes of our analysis, we shall assume that the "presumed" language in BCO § 18-59 does not create a conclusive, mandatory, absolute, or irrebuttable presumption, which would only strengthen our conclusion that the ordinance violates due process. Under BCO § 18-59, a property owner may, regardless of the fact that repair costs would exceed a structure's true cash value, avail himself or herself of an opportunity to overcome or rebut the presumption by showing that making repairs would nonetheless be reasonable under the circumstances. In turn, accomplishing the repairs would abate any unsafe conditions negating the presumption of public nuisance, thereby precluding a demolition order. Conceivably, a property owner could attempt to rebut the presumptions of BCO § 18-59 by pleading the owner's case directly to the city manager

[11] Considering that the issue on appeal concerns repair rights, our focus is more on the presumption that repairs are unreasonable, and therefore not permitted, than on the presumption that the unrepaired structure is a public nuisance.

or his designee, here the building official, but an attempt to show the reasonableness of repairs could presumably also be pursued in an appeal to the city council under BCO § 18-61. The city council contemplated, but ultimately rejected, a resolution which would have allowed plaintiffs six months to make the repairs necessary to avoid a demolition order.

Even though BCO § 18-59 can be interpreted to allow a property owner the opportunity to overcome or rebut the presumptions of that section, creating the possibility that an owner of a structure determined to be unsafe will be accorded an option to repair, such a construction of BCO § 18-59 still requires an owner to establish the reasonableness of making repairs. Stated otherwise, in order to overcome the presumption that allows the city to order demolition absent an option to repair, the property owner must show that making repairs is reasonable. We find this aspect of the ordinance to be constitutionally problematic and in violation of due process. The appeal section, BCO § 18-61, does not provide its own or a different standard; therefore, the city council in addressing an appeal would be constrained to also apply the reasonableness standard that governs BCO § 18-59. Such a standard prevents a property owner who has the desire and ability to make the necessary repairs in a timely fashion to render a structure safe, even when the cost of repairs exceeds the city-determined true cash value of the structure before it became unsafe, from doing so because the ordinance deems such repairs unreasonable.

We conclude that if the owner of an unsafe structure wishes to incur an expense that others might find unreasonable to repair a structure, bring it up to code, and avoid a demolition order, the city should not infringe upon the owner's property interest by forbidding

it. There may be myriad reasons why a property owner would desire to repair a structure under circumstances in which it is not economically profitable to do so, including sentimental, nostalgic, familial, or historic, which may not be measurable on an economic balance sheet. Ultimately, the owner's reasons for desiring to repair a structure to render it safe when willing and able even though costly, are entirely irrelevant and of no concern to the municipality.

We note that BCO § 18-59, by using the language "*may* be ordered" (emphasis added), gives the city manager or his designee the discretion to not order the demolition of a structure and to allow repairs even though the structure is unsafe and the repair costs exceed the structure's pertinent value. In other words, demolition is not mandated when it is unreasonable to make repairs. We find, however, that this discretionary language does not save the ordinance from constitutional challenge, considering that the ordinance places no constraints on the exercise of what is essentially unfettered decretion.

We hold that BCO § 18-59 violates substantive due process because it is arbitrary and unreasonable, constituting a whimsical ipse dixit; it denies a property owner the option to repair an unsafe structure simply on the basis that the city deems repair efforts to be economically unreasonable. When a property owner is willing and able to timely repair a structure to make it safe, preventing that action on the basis of the ordinance's standard of reasonableness does not advance the city's interest of protecting the health and welfare of its citizens. We do not dispute that a permissible legislative objective of the city under its police powers is to protect citizens from unsafe and dangerous structures and that one mechanism for advancing that

objective can entail demolishing or razing unsafe structures.[12] But BCO § 18-59 does not bear a reasonable relationship to this permissible legislative objective.[13] *Kyser*, 486 Mich at 521. There are two ways to achieve the legislative objective, demolition or repair, either of which results in the abatement of the nuisance or danger of an unsafe structure. There is simply no sound reason for prohibiting a willing property owner from undertaking corrective repairs on the basis that making such repairs is an unreasonable endeavor, given that the repairs, similar to demolition, will equally result in achieving the objective of protecting citizens from unsafe structures.[14] If a property owner fails to make the

[12] Municipalities may exercise their legitimate police powers to abate a public nuisance. *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 272; 761 NW2d 761 (2008). There is a well-established exception to the constitutional prohibition against takings without just compensation, which provides that because no person has the right to utilize property in a manner that creates a nuisance, the state, when asserting power to stop a nuisance, has not taken anything. *Id.* Consequently, governmental entities are not required to provide just compensation when they diminish or destroy a property's value to abate a public nuisance. *Id.*

[13] We note that BCO § 18-59 provides an exception when "a structure is unsafe as a result of an event beyond the control of the owner, such as fire, windstorm, tornado, flood or other Act of God." In such situations, "the owner shall be given . . . reasonable time within which to make repairs and the structure shall not be ordered demolished without option on the part of the owner to repair." BCO § 18-59. Thus, even if the cost of repairs exceeds the property's value, a right to repair exists when a structure is made unsafe through events that the owner could not control. Stated otherwise, repairs are permissible even though they are otherwise unreasonable.

[14] We recognize that there may occasionally be unique circumstances in which repair efforts cannot be allowed, despite a willingness by the property owner to do so, such as where repairs necessary to meet code requirements cannot be designed or cannot be accomplished in a safe or timely manner. There may also be emergency situations, see BCO § 18-56, where immediate destruction is necessary to avoid an imminent danger and repairs are not feasible. The instant action does not present a unique or an emergency situation. Moreover, and importantly, the

necessary repairs within a reasonable timeframe, demolition can then be ordered. The city's restriction on plaintiffs' opportunity to repair the structures and right to protect their constitutionally recognized property interests from invasion has no reasonable relation to the public welfare. *Kyser*, 486 Mich at 521. The public welfare is safeguarded by the construction repairs, and the ordinance does not afford the public greater protection or safeguards by calling for demolition over repairs when making repairs is characterized as being unreasonable. Of course, the municipality has the authority to define the repairs necessary and to set a reasonable time limit for their completion. For the reasons set forth above, we conclude that BCO § 18-59 violates substantive due process.

We also determine that BCO § 18-59 does not provide adequate procedural safeguards to satisfy the Due Process Clause. Before potentially depriving plaintiffs or any city property owners of their constitutionally protected property interests through demolition predicated on a determination that a structure is unsafe, the city was constitutionally required to provide plaintiffs with a reasonable opportunity to repair the unsafe structure, regardless of whether doing so might be viewed as unreasonable because of its cost. In addition to notice, a hearing, and an impartial decision-maker, which are provided for in § 18 of the BCO, the city should have also provided for a reasonable opportunity to repair an unsafe structure, limited only by unique or emergency situations.[15] Precluding an opportunity to repair on the basis that it is too costly in comparison

reasonableness standard employed in BCO § 18-59 focuses on economic and financial reasonableness because the ordinance is predicated on the examination of repair costs and property valuations.

[15] See n 14 *supra*.

with a structure's value or that making repairs is otherwise unreasonable can result in an erroneous and unconstitutional deprivation of a property interest, i.e., a deprivation absent due process of law. Giving a property owner the procedural protection of a repair option is the only way the city's ordinances could withstand a procedural due process challenge.

Due process is a flexible concept, but its essence is fundamental fairness. *Reed*, 265 Mich App at 159. The procedures that are constitutionally required in a particular case are determined by examining (1) the private interest at stake or affected by the governmental action, (2) the risk of an erroneous deprivation of the interest under existing procedures and the value of additional safeguards, and (3) the adverse impact on the government of requiring additional safeguards, including the consideration of fiscal and administrative burdens. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993), citing *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976). The nature of the private interest at stake in this case is substantial—plaintiffs' property interest as owners of three structures. Next, the risk of an erroneous deprivation of the property interest under BCO § 18-59 is significant as it allows for the demolition of unsafe structures when repairs are considered unreasonable despite an owner's willingness and ability to make timely repairs. The added safeguard of a repair option would eliminate the risk of an erroneous deprivation of the property interest. Finally, adding the safeguard of a repair option would minimally affect the city's interest in the health and welfare of its citizens, as well as not cause any fiscal or administrative burdens beyond those that would be associated with demolition of the property. Under BCO § 18-59, the cost to the city if it demolishes an unsafe structure may be assessed as a lien against the real property. If repairs are under-

taken by a property owner pursuant to a repair option, the owner and not the city bears the cost of those repairs, and the city's only function would be to determine what repairs are necessary and monitor their timely completion. With forced demolition by the city, the city would incur the costs and then have to seek reimbursement of expenses incurred, possibly requiring lien-foreclosure proceedings. In sum, on review of the pertinent factors in the present case, we find that procedural due process requires a property owner to have an option to repair a structure determined to be unsafe except in unique and emergency situations demanding immediate action.

Court decisions in other jurisdictions, while not binding precedent, provide persuasive support for our holding. See *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 639 n 15; 732 NW2d 116 (2007). In *Washington v City of Winchester*, 861 SW2d 125 (Ky App, 1993), the appellant-owner challenged a circuit court order that required her to demolish a building that had numerous building code violations. A building inspector initially ordered demolition, which decision was appealed to a city appeals board. The appeals board delayed demolition to allow a determination regarding the value of the building and the cost of repairs necessary to bring the building into compliance with the building code. Subsequently it was determined that the estimated cost to repair the building exceeded 100 percent of the building's appraised value. On the basis of this information, the appeals board affirmed the inspector's demolition order, and the circuit court then affirmed the decision by the appeals board. On appeal to the Kentucky Court of Appeals, the appellant building owner argued that she should have been given the opportunity to bring the building into compliance with the code through repairs. *Id.* at 126. Two separate code provisions were relevant, and they provided:

> PM-111.1: The code official shall order the owner of any premises upon which is located any structure or part thereof, which in the code official's judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, unsanitary or otherwise unfit for human habitation, occupancy or use, and so that such structure would be unreasonable to repair the same, to raze and remove such structure or part thereof; or if such structure can be made safe by repairs, to repair and make safe and sanitary or to raze and remove at the owner's option[.]
>
> PM-111.2: Whenever the code official determines that the cost of such repairs would exceed 100% of the current value of such structure, such repairs shall be presumed unreasonable and it shall be presumed for the purpose of this section that such structure is a public nuisance which shall be ordered razed without option on the part of the owner to repair. [*Id.*]

The appellate court agreed with the building owner that she should have been given the option to repair the building within a reasonable time. *Id.* The court, citing *Johnson v City of Paducah*, 512 SW2d 514, 516 (Ky, 1974), held that "the exercise of the city's police power is for the protection of the public, but the means of its implementation may extend no further than public necessity requires." *Washington*, 861 SW2d at 126. The court noted that the failure to provide a property owner the option of repair was arbitrary, that the government did not have absolute power over private property, and that improperly requiring demolition absent compensation constituted a taking. *Id.* at 126-127.[16] Finally, the Kentucky court observed:

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[16] The court ultimately determined that the code provision regarding repair costs and property values was unconstitutional under § 2 of the Kentucky Constitution. *Washington*, 861 SW2d at 126. Section 2 of the Kentucky Constitution provides that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." This principle is essentially

> [J]ust as the cost of . . . [code] compliance is a property owner's problem, the method of compliance is also the property owner's decision. It's his/her money and far be it from the [c]ity to say how a reasonable person should spend his/her money. . . . [A]s free men and women, we can spend our own money as we see fit, that if we want to pour endless dollars, sweat, etc., into some historic building, or personally appealing project, we may—even if the ultimate cost would be ten fold over the cost of demolition and rebuilding. So, too, with the [c]ity . . . and the appellant herein, if she wants to pour huge sums of money into her unfit building[], she has that option. A reasonable person may very well choose demolition, but it's her money and her choice. [*Id.* at 127.]

We agree with these sentiments and observations. While BCO § 18-59 varies slightly from the code provision at issue in *Washington*, we adopt the principles espoused in *Washington* for purposes of our analysis of BCO § 18-59.

In *Herrit v City of Butler Code Mgt Appeal Bd*, 704 A2d 186 (Pa Commw, 1997), the Pennsylvania Commonwealth Court addressed the constitutionality of a code provision identical to that at issue in *Washington*. The appellant, whose property was found to be unsafe and a public nuisance, maintained that the code provision was unconstitutional because it did not give him the opportunity to repair his property before demolition. *Id.* at 188. The court initially pointed out that the purpose of the demolition notice was to provide a property owner a reasonable amount of time to make repairs to abate the dangerous condition. *Id.* at 189. The court, relying on *Washington*, 861 SW2d at 125, concluded that the code provision was unconstitutional. It reasoned that the provision was not reasonably

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embodied in Const 1963, art 1, § 17, which provides that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law."

related to the health, safety, or general welfare of the public, because there was no rational basis not to permit the appellant the option to abate the nuisance. *Id.* The Pennsylvania court concluded that if the appellant wanted "to spend unreasonable amounts of money to bring his [p]roperty into compliance, that [was] only his concern." *Id.*

As in *Herrit* and *Washington*, we conclude that whether it is economically reasonable for a property owner to repair an unsafe or dangerous structure is irrelevant and cannot serve as the basis to deny a property owner an opportunity to repair a structure in order to comply with applicable code provisions.[17]

In considering an ordinance that permitted the demolition of a structure when the cost to comply with code requirements exceeded 50 percent of the structure's present value, the Georgia Court of Appeals ruled in *Horne v City of Cordele*, 140 Ga App 127, 130-131; 230 SE2d 333, 335-336 (1976):

> The vice of the ordinance under consideration is that it flatly permits uncompensated destruction of the owner's property where the cost of repair would exceed 50 percent of the value of the structure unrepaired. . . .
>
> * * *
>
> In the present case it appears that the owner twice applied for and was refused building permits in order to repair the house under consideration here. We do not find it necessary to reach the question of whether the owner was in good or bad faith in applying, or whether the

[17] We acknowledge a contrary result in *City of Appleton v Brunschweiler*, 52 Wis 2d 303; 190 NW2d 545 (1971), but find that case unpersuasive because the court addressed the issue as one of statutory interpretation and only superficially mentioned possible constitutional problems.

> building inspector was in good or bad faith in refusing the applications, or to pass on the remaining enumerations of error. Our holding is that any ordinance which authorizes demolition of a structure within the city without compensation to the owner merely because the cost of repair exceeds the value of the structure or any percentage therefof, without first allowing opportunity to repair (and, if necessary, providing for discovery of the criteria which must be met to bring the structure up to a minimum standard) is unconstitutional and void.

In *Horton v Gulledge*, 277 NC 353; 177 SE2d 885 (1970), overruled in part on other grounds by *State v Jones*, 305 NC 520; 290 SE2d 675 (1982), the North Carolina Supreme Court held that under its state constitutional version of the Due Process Clause, a city could not rely on an ordinance to order the demolition of unsafe structures without opportunity of repair when the cost to do so would exceed 60 percent or more of an unrepaired structure's value. The court, in finding a constitutional violation, noted that the city did not assert that the structure could not be made code compliant if it were to be repaired or find the existence of an imminent threat to the safety of persons or property that required the immediate destruction of the structure. *Id*. at 360. The court reasoned that the state's " 'police power does not include power arbitrarily to invade property rights.' " *Id*. at 363 (citation omitted). Further, "[p]olice regulation of the use or enjoyment of property rights can only be justified by the presence of a public interest, and such rights may be limited only to the extent necessary to subserve the public interest.' " *Id*. (citation omitted). Thus, the court concluded that when a structure can be repaired, it would be arbitrary and unreasonable for the city to require its destruction without first giving the owner a reasonable opportunity to remove the threat to the public health, safety and welfare by completing the necessary repairs. *Id*.

The case of *Village of Lake Villa v Stokovich*, 211 Ill 2d 106; 810 NE2d 13 (2004), in which the court found constitutional a statute permitting a municipality to file a complaint in court to seek the demolition of a dangerous and unsafe building after giving notice of the need to put the building in a safe condition, is a bit more difficult to assess. The property owners in that case agreed that the provision was intended to serve a legitimate governmental interest, but they argued that the cost limitation on the right to repair in the statute was arbitrary, unreasonable, and not rationally related to the governmental interest, citing many of the cases we have noted. The Illinois Supreme Court concluded that the cases cited by the property owners were inconsequential "because, in each case, the state statute or local ordinance found unconstitutional allowed an officer of the municipality to issue an order of demolition." *Id.* at 126. The statute at issue did not permit a municipal officer to order demolition; rather, it required the municipality to "give at least 15 days notice to the property owner of the need to 'put the building in a safe condition or to demolish it,' " affording some time for repairs. *Id.* at 127 (citation omitted). Only after the notice was issued could the municipality seek a demolition order in circuit court, where it had the burden of proving that the building was "dangerous and unsafe" or "uncompleted and abandoned." *Id*. The court could order demolition if substantial reconstruction was necessary to correct defects or if a structure was beyond reasonable repair, taking into consideration repair costs. *Id.* at 128. The Illinois court then concluded that the statute passed constitutional muster because

> [it] is entirely reasonable and protects the rights of the property owner while permitting the municipality to deal

> expeditiously with threats to the public health and safety. [The statute] makes a reasonable distinction between properties that are readily repairable and those that are not. The statute guarantees a property owner the opportunity to make repairs, either before or after an adjudication of "dangerous and unsafe," if the property is readily repairable. If, however, the property is in need of substantial reconstruction to render it safe, a property owner who is willing to undertake such a project must obtain the necessary permits and undertake repairs promptly upon receiving notice. The owner of such a property who does not promptly undertake repairs, but instead chooses to contest whether the building is dangerous and unsafe and to litigate the question of whether the building is readily repairable, runs the risk that he will lose on the merits and an order of demolition will issue. [*Id.* at 130.]

We read *Stokovich* as upholding the constitutionality of the statute because it affords property owners the opportunity to commence the process of necessary repairs during the 15-day notice period. In the instant action, BCO § 18-59 gives a municipal officer the authority to order demolition, and BCO § 18-52(c)(3) allows the notice to contain a statement that the structure is to be demolished without the option to make repairs. Indeed, the building official, in notifying plaintiffs, stated that he had determined that the structures were unsafe and not reasonable to repair, and he ordered demolition within 60 days. Accordingly, the ordinance at issue in this case is distinguished from the statute in *Stokovich*.

Finally, we note that our own Supreme Court, cautioning that a remedy should not be greater than necessary to achieve a desired result, has stated that "something less than destruction of the entire building should be ordered where such will eliminate the danger or hazard." *State Police Comm'r v Anderson*, 344 Mich 90, 96; 73 NW2d 280 (1955).

D. RESPONSE TO THE DISSENT

We find it necessary to address some of the arguments posed by our dissenting colleague. With respect to the criticism that procedural due process did not serve as a basis for the trial court's ruling and that it is not argued on appeal, we conclude that for the reasons stated earlier, procedural due process principles are implicated and need to be examined and applied in order to properly resolve this appeal. The failure to offer correct solutions to a controlling legal issue does not limit the ability of this Court "to probe for and provide the correct solution." *Mack v Detroit*, 467 Mich 186, 207; 649 NW2d 47 (2002). "[A]ddressing a controlling legal issue despite the failure of the parties to properly frame the issue is a well understood judicial principle." *Id.*

In regard to procedural due process, the dissent criticizes our ruling on the grounds that requiring a reasonable opportunity to repair is not a matter of process or procedure and that the procedural due process rights to notice, a hearing, and an impartial decisionmaker are satisfied under the BCO, with nothing more being required. As indicated previously in this opinion, an option-to-repair requirement, incorporated as part of a razing or demolition ordinance relative to nuisances and unsafe structures, can logically be viewed as a *procedural* mechanism or safeguard comparable to notice, hearing, and impartiality mandates. See *D&M Fin Corp*, 136 Cal App 4th at 174; *Hawthorne S & L*, 19 Cal App 4th at 159; *Miles*, 166 US App DC at 239. At the same time, the matter concerning an option to repair also has significant substantive attributes in relationship to due process protections, and the cases that we discussed earlier dealt with the issue of a repair option within the analytical framework of

either procedural or substantive due process; there were varied approaches as to which due process principle was applicable. Because of this overlap, and for purposes of providing a thorough and complete analysis, it is incumbent upon us to discuss procedural and substantive due process principles.

Next, as to the dissent's claim that plaintiffs were accorded procedural due process by way of notice, a hearing, and an impartial decisionmaker, it must be emphasized that procedural due process is not always satisfied in full simply because notice, a hearing, and an impartial decisionmaker were provided. In *Greenholtz v Inmates of the Nebraska Penal & Correctional Complex*, 442 US 1, 12-13; 99 S Ct 2100; 60 L Ed 2d 668 (1979), the United States Supreme Court explained:

> It is axiomatic that due process "is flexible and calls for such procedural protections as the particular situation demands." The function of legal process, as that concept is embodied in the Constitution, . . . is to minimize the risk of erroneous decisions. Because of the broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error. [Citations omitted.]

Notice and an opportunity to be heard are "the most *basic* requirements of procedural due process." *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009) (emphasis added). "The *fundamental* requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews*, 424 US at 333 (emphasis added; citation omitted). The *Mathews* Court observed that, "unlike some legal rules," due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id.* at 334 (quotation marks and citation omitted). "[T]he require-

ments for minimum due process may vary depending on the context." *Commonwealth v Brown*, 426 Mass 475, 482; 688 NE2d 1356 (1998). The "essential" elements of due process, i.e., "rudimentary" due process, require notice and a hearing. *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 271; 566 NW2d 514 (1997). Accordingly, there can be instances and situations in which procedural due process requires more than the minimum procedures noted by the dissent. And under the particular circumstances of this case and the *Mathews* factors, which we thoroughly analyzed earlier, we conclude that to satisfy procedural due process rights, an ordinance pertaining to the demolition of unsafe structures must include a provision that allows a property owner to exercise an option to repair, subject, of course, to reasonable limitations.

The dissent criticizes our reliance on *Washington*, 861 SW2d 125, *Johnson*, 512 SW2d 514, *Herrit*, 704 A2d 186, and *Horne*, 140 Ga App 127, arguing that they do not support our procedural due process ruling. We did not cite these cases with procedural due process specifically in mind; they were cited for their general due process analysis, and they tend to rely on substantive due process principles. These cases strongly support our finding of a substantive due process violation. The cases that we did expressly cite on the issue of procedural due process, *D&M Fin Corp*, 136 Cal App 4th 165, *Hawthorne S & L*, 19 Cal App 4th 148, and *Miles*, 166 US App DC 235, are not mentioned by the dissent.

The dissent concludes that one of the reasons that there is no constitutional violation is that a set of factual circumstances exist under which the ordinance is constitutional, i.e., when a structure is rendered unsafe due to events beyond the owner's control, such as weather-related events, in which case an option to

repair is expressly provided. See BCO § 18-59. We acknowledged in footnote 13 of this opinion that there is a provision in BCO § 18-59 that allows repairs for structures damaged by events beyond an owner's control, and we recognize that the fact that an ordinance might operate in an unconstitutional manner under some conceivable circumstances is insufficient to find it unconstitutional. See *Council of Orgs & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 568-569; 566 NW2d 208 (1997) (noting that if any factual situation can be conceived of that would sustain an act in the face of a constitutional challenge, the existence of that situation at the time of enactment must be assumed). The problem with the dissent's argument is that we are *not* addressing the constitutionality of the ordinance language in BCO § 18-59 concerning weather-damaged, unsafe structures; we are *not* finding that provision unconstitutional. Instead, we are solely finding unconstitutional the language or provision in BCO § 18-59 that deals with all other unsafe structures. An analogy is the best way to point out the flaws in the dissent's position. Under the dissent's reasoning, a statute that, for example, precludes application of the Fourth Amendment when brick houses are to be searched would be rendered constitutional, which conclusion is obviously legally unsound, if a different or additional section in the same statute required, consistent with constitutional principles, contemplation of the Fourth Amendment when all other types of houses are to be searched. This is nonsensical. The principles alluded to in *Council of Orgs*, 455 Mich at 568-569, simply mean, as applied here, that if there is a set of circumstances under which the language actually being addressed, i.e., the language regarding unsafe structures as caused or created by events within the control

of an owner, can be found constitutional, that language will survive a facial constitutional challenge.

The preceding argument naturally leads to the dissent's primary argument, made in the context of both procedural and substantive due process, that BCO § 18-59 is constitutional because an option to repair remains a possibility, even in regard to blameworthy owners, where BCO § 18-61 allows an appeal to the city council wherein the presumption created by BCO § 18-59 can be overcome and the council can allow the owner an opportunity to make repairs. We earlier acknowledged that an owner can appeal to the city council and, although the dissent does not mention it, we even noted that a property owner could attempt to overcome the presumption by pleading his or her case directly to the city manager or the manager's designee under BCO § 18-59. However, and this point is *not* addressed by the dissent despite its being the linchpin of our holding, in order to overcome the presumption—a presumption that repairs are *unreasonable*—when appealing to the city council or pleading to the city manager, the property owner would necessarily have to establish that the act of making repairs is *reasonable* before being granted an opportunity to make repairs. The constitutional defect is the reasonableness requirement associated with repairs; a property owner should be entitled to make repairs even if others would find it economically unreasonable to do so. The city council rejected plaintiffs' request to make repairs, finding, in part, that it was unreasonable to repair the structures.

BCO § 18-59 is implicated when a determination has been made that a structure is unsafe and that repair costs would exceed 100 percent of the structure's earlier true cash value. These determinations implicate the presumption that engaging in repairs is unreasonable, which presumption is necessarily tied to and impacts

the following presumption that the structure is a public nuisance, subjecting the property to an order of demolition. The presumptions are intertwined and the public-nuisance presumption is dependent on the unreasonable-to-repair presumption because if repairs are not permitted due to a failure to overcome the unreasonable-to-repair presumption by a showing that repairs are indeed reasonable, a structure would remain in a state of disrepair and would thus presumably be a public nuisance.[18] But if the unreasonable-to-repair presumption were overcome and repairs were permitted, the public-nuisance presumption would evaporate and become irrelevant, as the repairs would make the structure safe and obviate any nuisance. Accordingly, the reasonableness requirement as to repairs, which we find unconstitutional, actually permeates the entire process under BCO § 18-59 and then carries over to an appeal under BCO § 18-61.[19]

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[18] Conceivably, a property owner could attempt to overcome the public-nuisance presumption by showing that although the structure is unsafe and no repairs are to be made, the structure is nevertheless not a public nuisance. Showing a desire or wish to repair would have no bearing on or relationship to overcoming the public-nuisance presumption.

[19] We note that it is even arguable that BCO § 18-61 only allows an appeal of an unsafe-structure determination where it provides, "An owner of a structure determined to be unsafe may appeal the decision to the city council." Again, the presumptions in BCO § 18-59 only arise after it is determined that a structure is unsafe *and* the cost of repairs exceeds value. Therefore, if an owner simply wants an opportunity to repair and accepts that his or her structure is unsafe and that repair costs exceed value, or the owner cannot prove otherwise, one could reasonably construe BCO § 18-61 as not even permitting the owner to challenge the presumptions created by BCO § 18-59 in an appeal to the city council, as the council could only entertain a determination that a structure was unsafe. The language in BCO § 18-61 does not address appealing a demolition determination in general. If a property owner could show that a structure is safe, the whole issue of repairs and an option to repair becomes moot given that demolition could not be ordered under BCO § 18-59 absent a finding that a structure is unsafe. The fact that the city

In sum, we respectfully disagree with the dissenting opinion.

III. CONCLUSION

We interpret BCO § 18-59 as only allowing the exercise of an option to repair when a property owner overcomes or rebuts the presumption of economic unreasonableness, regardless of whether the property owner is otherwise willing and able to timely make the necessary repairs. We conclude that this standard is arbitrary and unreasonable. While police powers generally allow the demolition of unsafe structures to achieve the legitimate legislative objective of keeping citizens safe, the ordinance's exclusion of a repair option when repairs are deemed economically unreasonable bears no reasonable relationship to this legislative objective. Demolition does not advance the objective of abating nuisances and protecting citizens to a greater degree than repairs, even ones more costly than the present value of the structure and which an owner is willing and able to timely incur. Therefore, we hold that the ordinance violates substantive due process. Moreover, by not providing procedural safeguards in the form of an option to repair when a property owner's desire to repair could be viewed as unreasonable and lead to the unlawful deprivation of a constitutionally protected property interest, and which safeguard would burden the city to a lesser extent than demolition, the city's ordinance also violates procedural due process.

We affirm. As the prevailing parties, plaintiffs may tax costs pursuant to MCR 7.219(A).

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council heard plaintiffs' appeal and considered a repair option in this case does not mean that the council actually had the jurisdiction or the authority to do so, and the council could theoretically decline to hear future cases of a similar nature based on the language in BCO § 18-61.

SHAPIRO, J., concurred with MARKEY, P.J.

MURRAY, J. (*dissenting*). The trial court held that Brighton City Ordinance § 18-59 was facially unconstitutional on the basis that the ordinance's presumption, that an unsafe structure with an estimated repair cost of 100 percent of the structure's predeteriorated condition value should be demolished, violated plaintiffs' right to substantive due process. The majority's decision to affirm that decision is in error because there are circumstances under which the ordinance is valid. Additionally, the majority should not address whether this same section violates plaintiffs' rights to procedural due process, as the trial court did not rule on that issue. And, even if it were an issue properly before us, the ordinance does not violate plaintiffs' rights to procedural due process under the United States Constitution. I therefore lodge this dissent.

I. PROCEDURAL DUE PROCESS

As the majority notes, the trial court held BCO § 18-59 unconstitutional as a violation of plaintiffs' rights to substantive due process under the Fourteenth Amendment to the United States Constitution. That was the precise and only constitutional basis for the trial court's ruling that set aside the ordinance, and that is the only ruling challenged by defendant on appeal. We should limit our review to the decision rendered below and challenged on appeal, and proceed no further. *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999).[1] The majority

[1] The trial court did address plaintiffs' argument that defendant's decision that plaintiffs lost their *nonconforming use* status violated procedural due process. However, the court ruled that a genuine issue of material fact existed, and defendant did not appeal that ruling.

correctly cites to *Mack v Detroit*, 467 Mich 186, 207-208; 649 NW2d 47 (2002), for the proposition that a court may raise and decide an issue not raised by any party but that otherwise falls within a broader issue raised by a party. My concern, however, is utilizing our discretion to do so, for "[a]s any casual reader of the Michigan Appeals Reports will recognize, we quite frequently inform parties that we will not address an issue not raised or decided by the trial court, on the basis that it is not properly preserved." *People v Michielutti*, 266 Mich App 223, 230; 700 NW2d 418 (2005) (MURRAY, J., concurring in part and dissenting in part), rev'd in part on other grounds 474 Mich 889 (2005), citing *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992), and *People v Stacy*, 193 Mich App 19, 28; 484 NW2d 675 (1992). See, also, *People v Byrne*, 199 Mich App 674, 677; 502 NW2d 386 (1993) ("We generally do not address the merits of unbriefed issues."). But, because the majority has spent a good deal of time addressing this issue, my analysis and conclusion—that the ordinance in every way survives this facial procedural due process clause challenge—follows.

Before getting to the merits, it is vital to keep in mind several important principles of judicial review. First, all courts must exercise great caution before utilizing the judicial power to declare a law unconstitutional. *Council of Orgs & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 570; 566 NW2d 208 (1997). Indeed, we presume that an ordinance is constitutional, *In re Harrand*, 254 Mich 584, 589; 236 NW 869 (1931),[2] and therefore the party challenging the constitutional

[2] We make this presumption because of "our recognition that elected officials generally act in a constitutional manner when regulating within their particular sphere of government," *Truckor v Erie Twp*, 283 Mich App 154, 162; 771 NW2d 1 (2009), which clearly the Brighton City Council was doing when enacting the ordinances at issue.

validity of the law bears a heavy burden. *Houdek v Centerville Twp*, 276 Mich App 568, 573; 741 NW2d 587 (2007).

Second, as the majority notes, this is a facial challenge to the constitutionality of the ordinance. We have repeatedly made clear that the party bringing a facial challenge must satisfy an " 'extremely rigorous standard.' " *Keenan v Dawson*, 275 Mich App 671, 680; 739 NW2d 681 (2007), quoting *Wayne Co Bd of Comm'rs v Wayne Co Airport Auth*, 253 Mich App 144, 161; 658 NW2d 804 (2002). A facial challenge attacks the very existence of the ordinance, requiring plaintiffs to establish that "the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market." *Hendee v Putnam Twp*, 486 Mich 556, 589; 786 NW2d 521 (2010) (CORRIGAN, J., *concurring*) (quotation marks and citation omitted). Because a facial challenge attacks the ordinance itself, as opposed to how it is applied, a court must uphold the law if there are *any* circumstances under which it could be valid. *Keenan*, 275 Mich App at 680. In other words, even if facts can be conjured up that would make the law arguably unconstitutional, "if any state of facts reasonably can be conceived that would sustain [an ordinance]," those facts must be assumed and the ordinance upheld. *Council of Orgs*, 455 Mich at 568 (quotation marks and citation omitted). And, because this is a facial challenge, the actual facts surrounding plaintiffs' case are irrelevant. *Yates v Norwood*, 841 F Supp 2d 934, 938 n 8 (ED Va, 2012), citing *Forsyth Co, Ga v Nationalist Movement*, 505 US 123, 133 n 10; 112 S Ct 2395; 120 L Ed 2d 101 (1992).

With these important principles guiding the decision, the next question is whether ordinances BCO §§ 18-59

and 18-61 are facially unconstitutional under the Due Process Clauses of the United States Constitution.[3] With respect to the procedural component of these clauses, the focus is on—not surprisingly—ensuring that persons receive adequate *procedural protection* from government decisions that could deprive them of their property. See, generally, *Gorman v Univ of Rhode Island*, 837 F2d 7, 12 (CA 1, 1988). Specifically, the federal courts have held that the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v Eldridge*, 424 US 319, 333; 96 S Ct 893; 47 L Ed 2d 18 (1976), quoting *Armstrong v Manzo*, 380 US 545, 552; 85 S Ct 1187; 14 L Ed 2d 62 (1965). See also *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 213-214; 761 NW2d 293 (2008) (procedural due process requires notice, an opportunity to be heard before an impartial decision-maker, at a meaningful time and in a meaningful manner).

To be meaningful, the opportunity to be heard must occur before the person is permanently deprived of any significant property interest. *Cleveland Bd of Ed v Loudermill*, 470 US 532, 542; 105 S Ct 1487; 84 L Ed 2d 494 (1985); *Mathews*, 424 US at 333. The extent of the hearing constitutionally required varies, and depends on an evaluation of the following:

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[3] The federal due process clause that applies to the States is contained in the Fourteenth Amendment to the United States Constitution, and provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" US Const, Am XIV, § 1. Although the constitutional language only references process, *People v Sierb*, 456 Mich 519, 522-523; 581 NW2d 219 (1998), the United States Supreme Court has held that there is both a procedural and substantive part to the Fourteenth Amendment, *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 197; 761 NW2d 293 (2008). As noted, the trial court's ruling was based exclusively on the substantive requirements of the federal due process clause.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews*, 424 US at 335.]

The two ordinances at issue are BCO §§ 18-59 and 18-61. BCO § 18-59 provides in relevant part as follows:

> Whenever the city manager, or his designee, has determined that a structure is unsafe and has determined that the cost of the repairs would exceed 100 percent of the true cash value of the structure as reflected on the city assessment tax rolls in effect prior to the building becoming an unsafe structure, such repairs shall be presumed unreasonable and it shall be presumed for the purpose of this article that such structure is a public nuisance which may be ordered demolished without option on the part of the owner to repair.

If, as in this case, the city manager orders a building demolished, a party can—as plaintiffs did here—appeal that determination to the city council pursuant to BCO § 18-61, which provides in pertinent part:

> An owner of a structure determined to be unsafe may appeal the decision to the city council. The appeal shall be in writing and shall state the basis for the appeal. . . . The owner or his agent shall have an opportunity to be heard by the city council at a regularly scheduled council meeting. The city council may affirm, modify, or reverse all or part of the determination of the city manager, or his designee.

The majority acknowledges that these ordinances provide persons with notice,[4] an opportunity to be heard

[4] Another section of the ordinance spells out the detailed contents for the notice and how and when it is to be served upon the property owner. BCO § 18-52.

at a hearing before city council, and a decision from an impartial decision-maker. Recognizing that the ordinances provide notice and an opportunity to be heard before an impartial decision-maker should preclude any facial challenge to the ordinances based on procedural due process, especially when the *procedures* themselves are not alleged to be deficient. See, e.g., *English v Dist of Colombia*, 815 F Supp 2d 254, 266 (D DC, 2011) (dismissing procedural due process claim when the plaintiff was afforded predeprivation notice of the nature of the dispute, and an opportunity to be heard); *American Towers, Inc v Williams*, 146 F Supp 2d 27, 33 (D DC, 2001) (holding the same).

However, according to the majority, providing persons with notice, a full hearing before city council, and an impartial decision-maker is not enough to satisfy procedural due process. Instead, the majority holds that "the city should have also provided for a reasonable opportunity to repair an unsafe structure . . . ." This position is not sustainable. For one, the majority's focus is on the standards to be applied by the council (whether the council *must* allow a homeowner the option to repair when the cost exceeds 100 percent of the structure's value), as opposed to the *process* provided by the ordinance to persons who are contesting an inspector's decision. And, as set forth above, procedural due process is concerned only with the procedures employed by the government to allow the citizen to be heard before being deprived of his property. *Gorman*, 837 F2d at 12.

Additionally, the majority's analysis does not adhere to the standards governing facial challenges. Specifically, we must uphold the ordinances as long as there is any set of circumstances that would make the ordinances constitutional, *Keenan*, 275 Mich App at 680,

and the majority recognizes that under the ordinances as written city council could allow an owner to make repairs that exceed 100 percent of the structures value. Indeed, BCO § 18-59 contains only a *presumption* that a structure that needs repairs costing in excess of 100 percent of the structure's true cash value prior to becoming unsafe should be demolished. But, under BCO § 18-61, a person can make their case to city council and overcome the presumption, allowing for repairs rather than demolition. The ordinance itself also allows repairs without regard to cost when the structure is unsafe because of weather-related causes, i.e., not through owner neglect or negligence. Because the ordinances provide a meaningful hearing at a meaningful time, and because even when using the majority's added "safeguard" of an automatic repair option there are circumstances under which repairs can be made, we must uphold the validity of the ordinances against this facial challenge.

Finally, the decisional law from our sister states used by the majority to buttress its position on this issue is either inapplicable or unpersuasive. For instance, the Kentucky Court of Appeals' decision in *Washington v City of Winchester*, 861 SW2d 125 (Ky App, 1993), that the ordinance was arbitrary, was based on § 2 of the Kentucky Constitution that specifically prohibits absolute and arbitrary power. See *id*. at 126. Nor is there any discussion in *Washington* of the *Mathews* factors or other case law articulating the procedural due process standards that govern this issue. And, the only case *Washington* relies upon, *Johnson v City of Paducah*, 512 SW2d 514 (Ky, 1974), was also specifically based on § 2 of the Kentucky Constitution and likewise contains no discussion about what is required under the federal due process clause.

Similarly, in *Herrit v City of Butler Code Mgt Appeal Bd*, 704 A2d 186 (Pa Commw, 1997), the court did not analyze the case with procedural due process caselaw (though it does make mention of the plaintiffs asserting a Takings Clause claim), and appears to have instead utilized a standard to determine whether the ordinance was "arbitrary, unreasonable and ha[d] no substantial relation to the promotion of the public health, safety, morals or general welfare of" the city. *Id*. at 189. Again, the test used in *Herrit* is not one used to determine whether an ordinance violates the right to procedural due process, so it has no application to this issue. This is also the deficiency in *Horne v City of Cordele*, 140 Ga App 127, 130-131; 230 SE2d 333 (1976), in which the court relied on general notions of arbitrariness and public necessity to strike down the ordinance. That case *may* be helpful in considering plaintiffs' *substantive* due process claim (though in the end it really is not), but it offers no persuasive value with respect to the *procedural* due process issue.[5]

In sum, there is no dispute that plaintiffs received proper notice of the city inspector's decision, had the opportunity to appeal that decision to city council where a full hearing was held, and received a decision from what the majority concedes was an impartial decision-maker. Considering the *Mathews* factors, the city's ordinance satisfied the requirements of due pro-

[5] "Analyzing violations of substantive and procedural due process involves separate legal tests." *Garza-Garcia v Moore*, 539 F Supp 2d 899, 907-908 n 11 (SD Tex, 2007). See, also, *Cobb v Aytch*, 472 F Supp 908, 925-926 (ED Pa, 1979) aff'd in part, vacated in part, and rev'd in part on other grds 643 F2d 946 (CA 3, 1981). Thus, the majority should not conflate caselaw and its reasoning between the two different constitutional concepts. And, the fact that analyzing procedural due process claims requires a "flexible approach" does not mean that the different standards for analyzing these separate claims should be melded together.

cess.[6] Plaintiffs received all the process that they were constitutionally due, and this Court should not rule to the contrary.

II. SUBSTANTIVE DUE PROCESS

Turning now to the ruling actually made by the trial court, it is clear that the answer to plaintiffs' substantive due process claim[7] is not as simple. In the end, however, it meets with the same fate. Unlike procedural due process, substantive due process bars " 'certain government actions regardless of the fairness of the procedures used to implement them.' " *Mettler Walloon*, 281 Mich App at 197, quoting *Co of Sacremento v Lewis*, 523 US 833, 840; 118 S Ct 1708; 140 L Ed 2d 1043 (1998). The established test that a plaintiff must prove is " '(1) that there is no reasonable governmental interest being advanced by the present zoning classification or (2) that an ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question.' " *Dorman v Clinton Twp*, 269 Mich App 638, 650-651; 714 NW2d 350 (2006), quoting *Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998). Here, no one questions that the ordinances advance a legitimate governmental interest. Thus, the sole issue on the substantive due process claim is whether the ordinances are an unreasonable means of advancing the undisputed governmental interest.

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[6] Though the actual facts of what transpired during plaintiffs appeal are not relevant to this facial challenge, *Forsyth Co*, 505 US at 133 n 10, during the appeal and hearing before city council the parties submitted expert reports, affidavits, PowerPoint Presentations, live testimony, and oral arguments. The city council also provided a written decision.

[7] This is also a facial challenge to the city ordinances.

In conducting this analysis, the standard we must employ is again vitally important. Judicial review of a challenge to an ordinance on substantive due process grounds requires application of three rules:

> (1) the ordinance is presumed valid; (2) the challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of the property; that the provision in question is an arbitrary fiat, a whimsical ipse dixit; and that there is not room for a legitimate difference of opinion concerning its reasonableness; and (3) the reviewing court gives considerable weight to the findings of the trial judge. [*Yankee Springs Twp v Fox*, 264 Mich App 604, 609; 692 NW2d 728 (2004), quoting *A & B Enterprises v Madison Twp*, 197 Mich App 160, 162; 494 NW2d 761 (1992).]

Applying this difficult and deferential standard, and recognizing that we conduct a de novo review of the trial court's decision, I would hold that BCO § 18-59 survives plaintiffs' facial challenge. There are at least two reasons supporting this conclusion. First, city council's decision to implement a presumption of demolition if the repair costs exceed 100 percent of the value of the structure before it because unsafe is neither unreasonable nor arbitrary. For one, the ordinance is not a flat prohibition precluding all property owners within the Brighton city limits an opportunity to repair an unsafe structure, as BCO § 18-59 exempts certain unsafe structures from the presumption, in particular structures that came to be in that condition through no fault of the structure's owner, and structures that become unsafe from weather-related events or fire damage from sources other than the owner.

Additionally, for structures that are not exempt from the presumption, the ordinance grants city council the discretion to approve repairs instead of ordering demolition. For example, city council could—as plaintiffs

admit—simply decide after a hearing that the property owner should have an opportunity to repair before demolition occurs, or that repairs are only necessary. Thus, if there is a substantive due process right to repair one's property before demolition, then under this hypothetical that right is not violated. Because there are factual circumstances under which this ordinance is constitutional, under the governing standards plaintiffs cannot prevail on their facial challenge to the ordinance. *Keenan*, 275 Mich App at 680.

Second, it is difficult to conclude that the presumption is so arbitrary that it shocks the conscience. Although the position taken by the trial court and the majority is understandable, i.e., it might be good policy for the city to allow an owner to expend whatever resources they deem appropriate to repair their own premises, accepting that principle does not result in a conclusion that a presumption to the contrary for *some* unsafe structures is unconstitutional. In other words, that there may have been other reasonable means to accomplish the city's objective of removing unsafe structures from the city does not mean that the city's choice of employing these terms was arbitrary or the result of some "whimsical ipse dixit." *Yankee Springs Twp*, 264 Mich App at 609.[8] See, also, *Bolden v City of Topeka*, 546 F Supp 2d 1210, 1218-1219 (D Kan, 2008) (rejecting a substantive due process challenge to an ordinance that had a no-repair cost threshold of 15 percent, and stating that just because the city could have utilized a higher threshold does not mean that a lower one is unconstitutional.). City council is, of

[8] "Ipse dixit" is defined as "[s]omething asserted but not proved," Black's Law Dictionary (8th ed), so an ordinance resulting from a "whimsical ipse dixit" must result from an impulsive decision that has no proven basis to support it.

course, the policy-making body for the city, and we must be extraordinarily careful not to utilize somewhat vague constitutional standards to override policy decisions that are outside our authority to make. *Warda v Flushing City Council*, 472 Mich 326, 334; 696 NW2d 671 (2005). And, given the exceptions within the ordinance and the undisputed authority of the city to regulate unsafe structures, it is a reasonable position for Brighton's leaders to enact an ordinance containing a presumption that *certain* dwellings that need *substantial* repairs (and usually because of owner neglect) should be demolished, but leaving that ultimate decision to be made by city council after a hearing.

Finally, the trial court ruled that "withholding from the owner the option to repair does not advance the [city's] proferred interest any more than permitting the owner to repair it themselves," and because of that there lacked a real and substantial relation to the object sought to be obtained by the ordinance. This rationale elevates the standard of review beyond what is required by this facial challenge. As set out above, there are many factual circumstances under which this ordinance can be constitutional, and that alone is enough to allow the ordinance to survive this facial challenge. And, even setting aside the exceptions within the ordinance and the fact that city council can order repairs instead of demolition, it is not unreasonable for the city to have implemented a rebuttable presumption for a certain class of unsafe properties.[9]

I would reverse the trial court's order and remand for entry of an order granting defendant's motion for

[9] Structure owners whose property the presumption applies to always have the option to repair before the city gets involved or a finding that the structure is unsafe is made. If repairs are made on a regular or as-needed basis the structure should never become unsafe.

summary disposition on the substantive due process claim and for further proceedings on any remaining claims.

In re ROBERT H DRAVES TRUST

Docket No. 306014. Submitted November 14, 2012, at Detroit. Decided December 6, 2012, at 9:00 a.m.

Petitioners, the Robert H. Draves Trust and the Agnes L. Draves Trust, by the trustee for both trusts, James Hudnut, petitioned in the Macomb County Probate Court, seeking injunctive relief, damages, and permission to sell certain real property known as the Cedar Rest Resort. Petitioners alleged that the trusts had been unable to rent out the cottages at the resort and that the property taxes, the costs of repair, and the costs associated with obtaining liability insurance covering the property were prohibitive. Petitioners wanted to sell the property in order to allow Agnes Draves, the principal beneficiary of both trusts, to support herself. Respondents, Robert H. Draves, Jr., Thomas Draves, and Ruth Draves Harm, who are beneficiaries under the trusts, responded by noting that several actions concerning the trusts and an additional trust had been dismissed as a result of a settlement agreement that contained a provision stating that the Cedar Rest Resort could not be sold without the written agreement of three of the four following individuals: Robert H. Draves, Jr., James Hudnut, Charles Draves, and Ruth Draves Harm. Respondents alleged that three of the four named individuals had not consented in writing to the sale. Petitioners acknowledged that the parties had entered into the settlement agreement, but alleged that the settlement was "nonjudicial" and, under MCR 700.7111, was subject to modification. The court, Pamela G. O'Sullivan, J., eventually agreed with petitioners and entered an order permitting the sale on the basis that the circumstances had changed to the extent that the sale was necessary to effectuate the grantors' intent. Respondents appealed.

The Court of Appeals *held*:

1. The probate court erred by holding that the settlement agreement was nonjudicial. Although a probate court is entrusted with jurisdiction over matters involving trusts, its supervisory power is not automatic and it will supervise a trust only when an interested party has invoked its jurisdiction.

2. MCL 700.7111, which concerns nonjudicial settlement agreements, allows beneficiaries to resolve administrative issues without court involvement and promotes the extrajudicial resolution of trust issues. The statute falls within the statutory framework for relieving interested parties and the courts of the burdens and costs associated with continued court supervision and control of a trust. The present case does not involve the routine administration of a trust as contemplated by the statute. The parties settlement agreement was not simply an extrajudicial alteration of the trust, but was the result of active litigation, therefore, MCL 700.7111 was inapplicable. The settlement agreement was clearly "judicial." As long as a court can function as a court in deciding the question, receiving and applying factual testimony against identifiable standards, laws, and rules of law, the function conferred will not be regarded as nonjudicial.

3. The settlement agreement was actually a modification of the trusts. Although MCL 700.7411(1) provides a mechanism for modifying a noncharitable irrevocable trust, MCL 700.7411(2) provides that MCL 700.7411(1) does not apply to irrevocable trusts created before or to revocable trusts that became irrevocable before April 1, 2010. The Robert H. Draves Trust became irrevocable upon his death in 2009.

4. Former MCL 700.7207(1) provided on May 21, 2009, when the parties placed their settlement agreement on the record, that the probate court may approve an interpretation, construction, modification, or other settlement that is agreed upon in writing by all presently identified and competent beneficiaries whose interests in the trust may be affected to resolve a contest, controversy, or a question of construction or interpretation concerning the existence, administration, or termination of an irrevocable trust. Former MCL 700.7207(3) provided that the court shall approve such an agreement if it appears to have been reached in good faith and its effects are just and reasonable under all the relevant facts and circumstances. Finally, former MCL 700.7207(4) provided that an order in response to a petition under MCL 700.7207(1) is binding on each party who is represented in the proceeding and on others in accordance with MCL 700.1403(b) and that, after issuance of the order, the agreement as approved by the court shall be considered a part of the governing instrument of the trust. The parties' settlement agreement was binding because there was no question that all the trust beneficiaries and the trustee joined in the settlement agreement, the agreement was reached in good faith, and the effects of the settlement were just and reasonable at the time it was entered into.

5. An agreement to settle a pending lawsuit is a contract governed by the legal principles applicable to the construction and interpretation of contracts. Courts are bound to enforce settlement agreements absent evidence such as fraud or duress. By entering into the settlement agreement, the parties clearly entered into a contract to resolve all pending disputes. The probate court erred by allowing the sale in contravention of the parties' settlement agreement.

Reversed.

1. TRUSTS — JUDICIAL SUPERVISION.

A trust is not subject to continuing judicial supervision unless ordered by the court; a probate court will supervise a trust only upon an interested party's invocation of the court's jurisdiction (MCL 700.7201[2]; MCR 5.501[B]).

2. TRUSTS — NONJUDICIAL SETTLEMENT AGREEMENTS.

The provision of the Michigan Trust Code regarding nonjudicial settlement agreements allows beneficiaries to resolve administrative issues without court involvement; the provision promotes the extrajudicial resolution of trust issues within a framework that relieves interested parties and the courts of the burdens and costs associated with continue court supervision and control; the provision is inapplicable to a settlement agreement that is the result of active litigation and is not simply an extrajudicial alteration of the trust (MCL 700.7111).

3. COURTS — JUDICIAL FUNCTIONS.

A function conferred on a court will not be regarded as nonjudicial as long as the court can function as a court in deciding the question, receiving and applying factual testimony against identifiable standards, laws, and rules of law.

4. TRUSTS — COURTS — APPROVAL OF AGREEMENTS ADJUSTING BENEFICIAL INTERESTS.

MCL 700.7207(1), before its amendment effective April 1, 2010, provided that on the petition of an interested person, a probate court may approve an interpretation, construction, modification, or other settlement that is agreed upon in writing by all presently identified and competent beneficiaries whose interests in the trust may be affected to resolve a contest, controversy, or question of construction or interpretation concerning the existence, administration, or termination of an irrevocable trust; MCL 700.7207(3) provided that the court shall approve an agreement described in

§ 7207(1) if it appears to have been reached in good faith and its effects are just and reasonable under all of the relevant facts and circumstances; MCL 700.7207(4) provided that an order entered in response to a petition under § 7207(1) is binding on each party who is represented in the proceeding and on others in accordance with MCL 700.1403(b) and that, after issuance of the order, the agreement as approved by the court shall be considered a part of the governing instrument of the trust.

5. TRIAL — SETTLEMENT AGREEMENTS.

An agreement to settle a pending lawsuit is a contract governed by the legal principles applicable to the construction and interpretation of contracts; courts are bound to enforce settlement agreements absent evidence showing fraud or duress or that the agreement violates the law or public policy.

James H. Hudnut for petitioners.

Cashen & Strehl (by *William K. Cashen*) for respondents.

Before: FORT HOOD, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM. In the probate court, James Hudnut, the trustee for the Robert H. Draves Trust and the Agnes L. Draves Trust, requested that certain real property held by the trusts be sold. Respondents, Robert H. Draves, Jr., Thomas Draves, and Ruth Draves Harm, are beneficiaries under the two trusts. They objected to the sale on the basis of a prior settlement agreement, which contained an express provision that the property in dispute, the Cedar Rest Resort, could not be sold absent the consent of three of the four individuals named in the provision: Robert H. Draves, Jr., James Hudnut, Charles Draves, and Ruth Draves Harm. The probate court concluded that "[a]lthough the parties signed a Settlement Agreement that contains a release provision, the Court finds that circumstances have changed to the

extent that it is necessary to list the Cedar Rest Resort for sale in order to effectuate the intent of both Grantors." Citing MCL 700.7111(2), the probate court found that the parties' settlement agreement was "nonjudicial" and, therefore, subject to modification by the probate court. Because MCL 700.7111 has no application to the facts of this case, we conclude that the probate court erred by ordering that the Cedar Rest Resort be sold in contravention of the parties' settlement agreement.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. PRIOR LITIGATION

Robert H. Draves, Sr. (Draves, Sr.) and Agnes were husband and wife. The two trusts were created in 2000 and had as their stated goals the support and maintenance of the surviving spouse. Robert, Sr., has since died, but Agnes is still alive. The trusts own real property on the south arm of Lake Charlevoix, consisting of over 1,300 feet of lake frontage and 14 rental cottages known as the Cedar Rest Resort. Robert, Sr., and Agnes's oldest son, Robert H. Draves, Jr. (Draves, Jr.), managed the property before his father's death. Familial discord eventually created separate factions within the family. Agnes and her son Charles Draves allied with attorney James Hudnut against the other children—Draves, Jr., Thomas, and Ruth.

A variety of lawsuits were filed among the parties. On December 16, 2008, Hudnut filed two "Petitions for Removal of Trustee and Accounting" in the Macomb County Probate Court (Macomb County Probate Court Cases 08-195-691-TV and 08-195-692-TV). The petitions alleged that Draves, Jr., had been mismanaging the Cedar Rest Resort and that Agnes feared that

Draves, Jr., was using the income and funds derived from managing the property for his own personal benefit. Although Draves, Jr., had been advised of the termination of his managerial status, Agnes feared that he would not vacate the premises. The petitions alleged that, although the Cedar Rest Resort was to provide income for Agnes's care and maintenance, she "has received little support and maintenance from operations and has literally had to beg [Draves, Jr.] for money from time to time to sustain herself . . . ." The petitions alleged that Draves, Jr. "is opposed to a sale of the property solely for his personal benefit and not for the benefit of the beneficiaries of either Trust Plaintiffs and the respective beneficiaries." The probate court discharged Draves, Jr., as the manager of the Cedar Rest Resort, holding that the provisions of the Robert H. Draves Trust "clearly provide the authority of Agnes L. Draves to discharge the manager of the property known as 'Cedar Rest Resort' . . . at such time as she [becomes] dissatisfied with management of the resort . . . ."

At approximately the same time, on December 17, 2008, Hudnut, as cotrustee of the Ann Gural Trust, filed suit in the Oakland County Probate Court against Draves, Jr., as cotrustee of the Ann Gural Trust (Oakland County Probate Court Case 2008-320672-CZ). Gural had been a friend of the Draves family. She had established a trust that was to benefit her friends, Agnes Draves and Robert Draves, Sr. Hudnut's verified complaint alleged that Draves, Jr., had had power of attorney for Gural during her lifetime and was the special personal representative of her estate. The complaint alleged that Draves, Jr., "exercised undue influence upon Ann Gural in order to attempt to convert the accounts of the Trust" for his own benefit. In his answer, Draves, Jr., wrote that "[t]he goal of Hudnut's actions is to acquire the corpus of the Draves Family trusts, Cedar Rest Resort[,] and sell it without

regard to market conditions, thus injuring the trusts and its beneficiaries." Draves, Jr., and his wife, Pamela Draves, filed counterclaims against Hudnut, individually, alleging, in part, defamation. The counterclaims alleged that Hudnut made these accusations "for the purpose of obtaining leverage to use against Robert H. Draves Jr. in a power struggle for the control of the 'family jewel,' the Cedar Rest Resort" and "to terminate Robert H. Draves Jr.'[s] life-long position as manager of the Cedar Rest Resort and evict him and his wife from the premises." The counterclaims also alleged wrongful and tortuous interference with a contractual relationship and that Hudnut's "ulterior purpose of the action is to win a power struggle over the assets of the Draves family trusts."

On January 13, 2009, Draves, Jr., and his wife Pamela Draves filed third-party claims against Hudnut (Macomb County Probate Court Case 09-195-854-CZ). They alleged defamation, wrongful and tortuous interference with a contractual relationship, intentional infliction of emotional distress, abuse of process, breach of fiduciary duty, and loss of consortium.

B. THE SETTLEMENT AGREEMENT

While these cases were pending, the parties entered into a settlement agreement in May 2009. The settlement agreement provided, in relevant part:

> BACKGROUND
>
> A. There is currently pending before the Oakland County Probate Court case No. 2008-320-672-CZ.
>
> B. There is currently pending before the Macomb County Probate Court case numbers 2008-195-691-TV; 2008-195-692-TV and 2009-195-854-CZP.
>
> * * *

F. That James Hudnut as Co-Successor Trustee of the Ann Gural Trust and as attorney for the Trustees of the Robert H. Draves Trust and Agnes Draves Trust alleges to have numerous claims and causes of action against Robert H. Draves, Jr. as identified in the Petitions filed in both the Oakland and Macomb County Probate Courts.

G. That Robert H. Draves, Jr. and Pamela Draves allege to have numerous claims and causes of actions against James Hudnut as identified in the Petitions/Complaints filed in both the Oakland and Macomb County Probate Courts.

H. That Robert Draves Jr. further alleges to have claims against the Robert Draves Trust, Agnes Draves and the Agnes Draves Trust for payment of services rendered in the maintenance and running of "Cedar Rest Resort". Said claim is for both monetary compensation and a 200 foot lakeside building site and 32 acres of adjourning meadow land and is not a part of any of the actions as identified in the Petitions/Complaints as filed in both the Oakland and Macomb County Probate Courts.

I. That issues exist between the parties of this agreement concerning the Trusts and/or estate plans established by Ann Gural, Robert Draves Sr. and Agnes Draves.

J. That the Petitioners and Respondents wish to settle the issues as raised in the above captioned causes of action as follows.

AGREEMENT

* * *

B. **Oakland County Litigation**:

* * *

(2) That the current value of assets held by Robert H. Draves Jr. and alleged to be assets of the Ann Gural Trust total $343,139.19. Said amount represents the funds being held pursuant to the Oakland County Probate Court Orders dated February 19, 2009.

(3) That within 30 days of the execution of this Settlement Agreement the following sums will be paid by Robert H. Draves, Jr. to the following individuals and under the following stipulations, terms and conditions:

(a) The sum of one hundred fifty thousand dollars ($150,000.00) shall be paid to the Agnes Draves Trust dated July 11th, 2000 to be used pursuant to the terms thereunder and as modified herein.

(b) Robert H. Draves Jr. shall pay the sum of $82,081.59 to Charles Draves.

(c) Robert H. Draves Jr. shall pay the sum of $54,528.80 to each of the following individuals: Thomas Draves and Ruth Harm.

* * *

C. **Macomb County Litigation**: That upon the execution of this Settlement Agreement the following terms and conditions shall apply to the disposition, sale, management or administration of the real property known as the "Cedar Rest Resort" and all of the other assets held or controlled by the Estate plans and Trusts of Robert H. Draves and Agnes Draves both during and after the life of Agnes Draves:

(1) That Robert H. Draves Jr. shall resign as the Trustee of the Cedar Rest Resort as delineated in paragraphs 2.8.2 of both the Robert Draves Trust and the Agnes Draves Trust dated July 11th, 2000.

(2) That upon the execution of this Settlement Agreement the Petitioners and Respondents do hereby agree that the terms and conditions of . . . the Robert Draves Trust and Agnes L. Draves Trust dated July 11th, 2000 (as hereto attached as exhibit 1) without any amendments, revisions or modifications made thereto, except as made herein, shall control the disposition of the following assets:

(a) the real property or proceeds from the sale or mortgage of the real property known as "The Cedar Rest Resort" located in Charlevoix County, Michigan (the legal descriptions of said property are hereto attached as exhibit

3), regardless of the manner in which said real property or the proceeds derived therefrom is/are currently or subsequently held or titled or whom may be listed as beneficiaries or joint owners thereof, whether presently or in the future;

* * *

(4) Any amendments, revisions or modifications of this agreement, the Trusts or concerning or relating to the use, management of, disposition of, transfer, gifting, sale, encumbrance or conveyance of the real property known as the Cedar Rest Resort (or the proceeds obtained from the sale or mortgage of said real property) and any other assets currently held by said Trust(s) or obtained by said Trust(s) after the execution of this settlement agreement may only be made upon the unanimous express written approval of Agnes Draves, Robert H. Draves, Jr. Charles Draves, Ruth Harm and Thomas Draves;

* * *

(11) That notwithstanding the powers granted to the Trustee under Article 3 of the Robert H. Draves Trust and the Agnes Draves Trust the real property held by the Robert and Agnes Draves Trust Agreements dated July 11th, 2000 (known as the "Cedar Rest Resort") shall not be listed for sale, sold, mortgaged or encumbered in any way by the Trustees of either Trust unless 3 of the 4 following individuals agree in writing to the terms of any proposed mortgage, encumbrance, listing agreement and/or sale thereof: Robert H. Draves, Jr., James Hudnut, Charlie Draves and Ruth Harm.

* * *

3. Release and Covenant Not to Sue: That each subscribing individual, Trustee, Successor Trustee in their capacities as individuals/Trustees/Successor Trustees hereby releases each of the others from liability for any and all claims or causes of action (known or unknown) includ-

> ing but not limited to the alleged claim of Robert Draves Jr. for monetary compensation, 1 200 foot lakeside building site and 32 acres of adjoining meadow land as detailed in paragraph H of the background above, that he/she/it may have arising out of the Estates/Trusts or the current litigation in the Oakland and Macomb County Probate Courts and hereby covenants not to institute or pursue any action or other legal proceeding (including arbitration) against any of the subscribing individuals with respect to any claim or cause of action released hereunder.
>
> * * *
>
> 7. Entire Agreement: This Settlement Agreement, as specifically made between Petitioners and Respondents, supersedes all prior agreements, arrangements and communications, whether oral or written, with respect to the subject matter agreed upon between Petitioners and Respondents. The terms contained in this Settlement Agreement, as made specifically between the Petitioners and Respondents, shall not be modified or amended except by the written agreement of all of the Petitioners and Respondents and, if required, the approval of the Oakland County or Macomb County Probate Court.
>
> * * *
>
> 15. Retained Jurisdiction. The Oakland and Macomb County Probate Courts shall retain jurisdiction to enforce any of the terms and conditions of this Settlement Agreement.

The settlement agreement was presented to and accepted by the Macomb County Probate Court on May 21, 2009:

> *Mr. Hudnut*: We are pleased to announce that both have agreed, both of the Draves Trust case[s] against Robert Draves Jr. have been settled and the agreements have been signed . . . .

The Court: All right, and then that's in regards to File Number 195,691, that's a trust file in the matter of the Robert Draves Trust as well as 195,692, that's also a trust file in the matter of Agnes Draves Trust and File 195,854 and that's the civil matter concerning I believe Robert Draves Jr. and James H. Hudnut. I didn't know that was in a separate file. It's a civil matter so I guess--

Mr. Hudnut: The settlement agreement takes care of that as well then.

The Court: Wonderful. . . .

* * *

. . . [S]o, all of the interested parties have signed this document indicating to the Court that they have agreed to the cases of the settlement [sic] with the entry of this settlement agreement and Order, there will be no other outstanding issues involving any of these files.

* * *

Mr. [*Paul*] *Varchetti* [On behalf of Robert Draves, Jr., Thomas Draves, Pamela Draves, and Ruth Draves Harm]: There's Orders already prepared in the two trust files, we'll have to prepare an Order of the CZ file which I can prepare and file tomorrow.

The Court: That will be great and, again, these are Orders of dismissal, so, I'm signing them as we speak.

Is there anything else that needs to be placed on the record then on any of these cases?

Mr. Hudnut: I don't think so, your Honor, I think everything is pretty well tied up [] and handled.

The settlement agreement was also entered into the records of the other cases, which were dismissed with prejudice. The orders of dismissal in Macomb County Probate Court Cases 08-195-691-TV and 08-195-692-TV provided:

> The parties herein appearing by their respective attorneys having appeared before the Court on a regularly scheduled Motion for various relief as stated in the Motions on file, and Counsel for the Plaintiff having stated that the Plaintiff Trust and the Defendant and the beneficiaries of the Plaintiff Trust have arrived at a mutual settlement of all of the issues and claims presently existing and such agreement is exhibited by their respective signatures to the Settlement Agreement in the possession of each attorney of the parties;
>
> THEREFORE on motion of James H. Hudnut, attorney for the Plaintiff
>
> **IT IS ORDERED** that the above entitled cause and the claims, Counterclaims and Third Party Claims are all dismissed with prejudice and without costs to any party.

The order of dismissal in Oakland County Probate Court Case 2008-320672-CZ likewise provided:

> IT IS HEREBY ORDERED AND ADJUDGED that the attached Settlement Agreement dated May 20, 2009 (Exhibit A) entered into between Robert H. Draves, Jr., James Hudnut, Charles Draves, Agnes Draves, Thomas Draves, Ruth Harm and Pamela Draves is hereby approved;
>
> IT IS FURTHER ORDERED AND ADJUDGED that any and all causes of action which were plead or which could have been plead in the instant matter shall be dismissed with prejudice and without costs to any party;
>
> IT IS FURTHER ORDERED AND ADJUDGED that the January 22, 2009 Preliminary Injunction and the February 19, 2009 Orders entered by this Court restricting the use of certain assets received by Defendant Robert Draves, Jr. from Ann Gural or her Trust are hereby dissolved and said assets shall be used as agreed to by the parties in the attached Settlement Agreement;
>
> IT IS FURTHER ORDERED AND ADJUDGED that this Honorable Court shall retain jurisdiction to administer any disputes with respect to the performance or compliance by any party under the Settlement Agreement.

C. THE CURRENT LITIGATION

On May 16, 2011, petitioners, the Robert H. Draves Trust and the Agenes L. Draves Trust, filed the present action in the Macomb County Probate Court, seeking injunctive relief, damages, and permission to sell real property. Petitioners alleged that the trusts were unable to rent out the cottages in 2010 and that the property taxes, the costs of repair, and the costs associated with obtaining liability insurance were prohibitive. Petitioners wanted to sell the property in order to allow Agnes (the principal beneficiary of both trusts) to support herself. Petitioners acknowledged that the parties entered into a settlement agreement to resolve a number of cases pending between them; nevertheless, petitioners alleged that the settlement was "nonjudicial" and subject to modification.

Initially, the Macomb County Probate Court noted that it was not inclined to grant petitioners' request for relief:

> Again, my initial reaction is that that settlement was placed upon the record in this Court, it was agreed upon by all of the parties, and at that point in time it clearly reflected the parties' interest and they wanted it entered by this Court. And I believe that the circumstances have changed and that now that has prompted a request for an amendment or a reconsideration of that agreement but, sir, I'm not convinced at this point that you have given me a compelling enough argument to grant the relief that you have asked. But I am going to take a look at it, I want to make sure that the Court is proper in denying your request, I want to look at it under the Trust Code to see that, in fact, I am sound in my decision to deny your petition.

However, on September 1, 2011, the probate court issued a written opinion and order wherein it granted petitioners' request for relief. In an about-face, the probate court noted:

> After a review of the applicable law, the Court finds that the Petition should be granted and the Cedar Rest Resort property be listed for sale. In reaching this determination, the Court found MCL 700.7111 applicable.
>
> MCL 700.7111(2) reads:
>
> "A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this article or other applicable law."
>
> After reviewing the provisions of the Trusts as well as the Settlement Agreement, the Court finds that a material purpose of the Trusts is to provide comfort and care to each of the Grantors during their lifetime by utilizing assets of the Trusts. . . .
>
> * * *
>
> When these directives are taken as a whole, it appears to the Court that the intent of Robert and Agnes Draves was to utilize assets of the Trusts to provide comfort and care to the surviving spouse. Although the parties signed a Settlement Agreement that contains a release provision, the Court finds that circumstances have changed to the extent that it is necessary to list the Cedar Rest Resort for sale in order to effectuate the intent of both Grantors. To allow a stalemate to continue with respect to the sale of the Cedar Rest Resort property only serves to violate a material purpose of the Trusts.

Respondents now appeal as of right.

II. STANDARD OF REVIEW

This appeal concerns the construction and applicability of MCL 700.7111. Questions of statutory interpretation are reviewed de novo. *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010). In *McCormick v Carrier*, 487 Mich 180, 191-192; 795 NW2d 517

(2010), our Supreme Court recited the governing principles regarding the interpretation of a statute:

> The primary goal of statutory construction is to give effect to the Legislature's intent. This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted. When reviewing a statute, all non-technical words and phrases shall be construed and understood according to the common and approved usage of the language, MCL 8.3a, and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal. A court should consider the plain meaning of a statute's words and their placement and purpose in the statutory scheme. Where the language used has been subject to judicial interpretation, the legislature is presumed to have used particular words in the sense in which they have been interpreted. [Citations and quotation marks omitted.]

Moreover, in *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009), the Michigan Supreme Court emphasized:

> A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained. The statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme. Moreover, courts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute.

III. ANALYSIS

On appeal, respondents argue that the probate court erred by holding that the parties' settlement agreement was "nonjudicial." We agree.

The Michigan Trust Code (MTC), MCL 700.7101 to 700.7913, falls within the larger Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. Under EPIC, a probate court has exclusive jurisdiction over matters involving the "validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary . . . ." MCL 700.1302(b). The probate court also has concurrent jurisdiction over matters concerning *inter alia* the property rights and interests in a trust and may hear and decide any contract proceeding or action by or against a trust. MCL 700.1303(1)(a) and (i). Importantly, "[t]he underlying purpose and policy of this section is to simplify the disposition of an action or proceeding involving . . . a trust estate by consolidating the probate and other related actions or proceedings in the probate court." MCL 700.1303(3).

However, although the probate court is entrusted with jurisdiction over matters involving trusts, its supervisory power is not automatic. In fact, under the MTC, registration of a trust is not even required. MCL 700.7201(2) provides:

> A trust is not subject to continuing judicial supervision unless ordered by the court. Registration of a trust or another proceeding concerning a trust does not result in continuing judicial supervision unless ordered by the court. Subject to court jurisdiction as invoked by an interested person or as otherwise exercised as provided by law, the management and distribution of a trust estate, submission of an account or report to beneficiaries, payment of a trustee's fees and other trust obligations, acceptance and change of trusteeship, and any other aspect of trust administration shall proceed expeditiously consistent with the terms of the trust, free of judicial intervention, and without court order or approval or other court action.

Similarly, MCR 5.501(B) provides:

> Unsupervised Administration of Trusts. Unless an interested person invokes court jurisdiction, the administration of a trust shall proceed expeditiously, consistent with the terms of the trust, free of judicial intervention and without court order, approval, or other court action. Neither registration nor a proceeding concerning a trust results in continued supervisory proceedings.

Therefore, a probate court will supervise a trust only upon an interested party's invocation of the court's jurisdiction. Under the MTC, trusts are unsupervised by default; registration of a trust is permissive, not mandatory.

With this in mind, an examination of the MTC reveals that MCL 700.7111 applies to circumstances not present in this case. MCL 700.7111 provides, in relevant part:

> (1) Except as otherwise provided in subsection (2), interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.
>
> (2) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this article or other applicable law. A nonjudicial settlement agreement shall not be used to accomplish the termination or modification of the trust.
>
> (3) Matters that may be resolved by a nonjudicial settlement agreement include any of the following:
>
> (a) The interpretation or construction of the terms of the trust.
>
> (b) The approval of a trustee's report or accounting.
>
> (c) Direction to a trustee to perform or to refrain from performing a particular act or to grant to or to withhold from a trustee any power.

> (d) The resignation or appointment of a trustee and the determination of a trustee's compensation.
>
> (e) Transfer of a trust's principal place of administration.
>
> (f) Liability of a trustee for an action relating to the trust.
>
> (4) Any interested person or trustee may request the court to approve or disapprove a nonjudicial settlement agreement. On a determination that the representation as provided in [MCL 700.7301 *et seq*.] was adequate, that the agreement does not violate a material purpose of the trust, and that the agreement contains terms and conditions the court could have properly approved, the court shall enter an order approving the agreement.

Specifically, MCL 700.7111 allows beneficiaries to resolve administrative issues without court involvement, freeing the probate court from supervisory control. Section 7111 promotes extrajudicial resolution of trust issues and falls within the statutory framework for relieving interested parties and the courts of the burdens and costs associated with continued court supervision and control.[1]

---

[1] However, a probate court naturally supervises "civil actions," even if the underlying trust estate is unsupervised. The former version of MCR 5.101 applicable to this case provided:

> (A) Form of Action. There are two forms of action, a "proceeding" and a "civil action."
>
> (B) Commencement of Proceeding. A proceeding is commenced by filing an application or a petition with the court.
>
> (C) Civil Actions, Commencement, Governing Rules. The following actions, must be titled civil actions, commenced by filing a complaint and governed by the rules which are applicable to civil actions in circuit court:
>
> (1) Any action against another filed by a fiduciary or trustee, and
>
> (2) Any action filed by a claimant after notice that the claim has been disallowed.

The case at bar is not one involving the routine administration of a trust as contemplated by MCL 700.7111. In fact, the parties were involved in protracted litigation with cases pending in the Macomb and Oakland County Probate Courts at the time the settlement agreement was entered into. It is obvious that the parties intended that the settlement agreement resolve *all* pending matters. The settlement agreement provides: "That the Petitioners and Respondents wish to settle the issues as raised in the above captioned *causes of action* as follows . . . . " And, at the hearing placing the settlement agreement on the record, the following took place:

> *The Court*: All right, and then that's in regards to File Number 195,691, that's a trust file in the matter of the Robert Draves Trust as well as 195,692, that's also a trust file in the matter of [the] Agnes Draves Trust and File 195,854 and that's the civil matter concerning I believe Robert Draves Jr. and James H. Hudnut. *I didn't know that was in a separate file. It's a civil matter so I guess--*
>
> *Mr. Hudnut*: *The settlement agreement takes care of that as well then*. [Emphasis added.]

The probate court was presented with the settlement agreement, the parties indicated their desire to have the settlement agreement entered into the record, numerous pending actions were dismissed as a result of the settlement agreement, and the probate court retained jurisdiction to administer any disputes with respect to the performance or compliance of a party under the settlement agreement. It must be stressed that the parties' settlement agreement was not simply an extrajudicial alteration of the trusts, but was the result of active litigation; as such MCL 700.7111 was inapplicable.

In addition, Black's Law Dictionary defines "judicial" as: "**1.** Of, relating to , or by the court or a judge . . . . **2.** In court . . . . **3.** Legal . . . . **4.** Of or relating to a

judgment . . . ." Black's Law Dictionary (9th ed). It also defines "*non*" as: "Not; no. This term negates, sometimes as a separate word and sometimes as a prefix." *Id*. On the basis of these definitions alone, it would appear that the settlement agreement at issue in this case was clearly "judicial." Again, the probate court was presented with the settlement agreement, the parties indicated their desire to have the settlement agreement entered into the record, numerous pending actions were dismissed as a result of the settlement agreement, and the probate court retained jurisdiction to administer any disputes with respect to the performance or compliance of a party under the settlement agreement. As our Court has stated, "as long as the court can function as a court in deciding the question, receiving and applying factual testimony against identifiable standards, laws and rules of law, the function conferred will not be regarded as nonjudicial." *Chamberlin v Detroit Edison Co*, 14 Mich App 565, 576; 165 NW2d 845 (1968). There is simply nothing about this case that would bring it within the purview of MCL 700.7111.

Instead, the settlement agreement was actually a modification of the trusts. MCL 700.7411, the current MTC provision regarding the modification of trusts, provides, in part:

> (1) Subject to subsection (2), a noncharitable irrevocable trust may be modified or terminated in any of the following ways:
>
> (a) By the court upon the consent of the trustee and the qualified trust beneficiaries, if the court concludes that the modification or termination of the trust is consistent with the material purposes of the trust or that continuance of the trust is not necessary to achieve any material purpose of the trust.

> (b) Upon the consent of the qualified trust beneficiaries and a trust protector who is given the power under the terms of the trust to grant, veto, or withhold approval of termination or modification of the trust.
>
> (c) By a trustee or trust protector to whom a power to direct the termination or modification of the trust has been given by the terms of a trust.

However, MCL 700.7411(2) specifically provides: "Subsection (1) does not apply to irrevocable trusts created before or to revocable trusts that become irrevocable before April 1, 2010." Here, the parties agree that the Robert H. Draves Trust became irrevocable upon his death in 2009.

At the time the parties placed their settlement agreement on the record, May 21, 2009, former MCL 700.7207 provided:

> (1) On petition of an interested person, the court may approve an interpretation, construction, modification, or other settlement that is agreed upon in writing by all presently identified and competent beneficiaries whose interests in the trust may be affected to resolve a contest, controversy, or question of construction or interpretation concerning the existence, administration, or termination of an irrevocable trust.
>
> * * *
>
> (3) The court shall approve an agreement described in subsection (1) if it appears to have been reached in good faith and its effects are just and reasonable under all of the relevant facts and circumstances.
>
> (4) The order in response to a petition under subsection (1) is binding on each party who is represented in the proceeding and on others in accordance with [MCL 700.1403(b)]. After issuance of the order, the agreement as approved by the court shall be considered a part of the governing instrument of the trust.

There is no question that all the trusts' beneficiaries and the trustee agreed to the settlement agreement. There is also no real question that the agreement was reached in good faith and that the effects were just and reasonable at the time the settlement agreement was entered into. As such, the parties' settlement agreement was binding on the parties.

The global settlement was the parties' expression of a desire to end litigation with terms that each could live with, creating a contractual agreement between them. MCR 2.507(G) provides that "[a]n agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney." "An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts." *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994). The bedrock of contract law is that "parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003). In fact, "[t]he notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable." *Id.* at 52. Thus, "[t]he litigant who . . . asserts [a mistake of fact defense] to a stipulation freely entered into in open court carries a heavy burden of persuasion. Every presumption of judicial care, of professional competence, and of decretal stability is against the overthrow, in the appellate court, of such stipulation and of orders

and decrees based thereon." *Wagner v Myers*, 355 Mich 62, 68; 93 NW2d 914 (1959). Courts are bound to enforce settlement agreements absent evidence such as fraud or duress. *Massachusetts Indemnity & Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994).

As can be seen from the parties' prior litigation, the management, ownership, and control of the Cedar Rest Resort has been the focus from the start. Whether it should be sold has been in dispute since 2008. By entering into the settlement agreement, the parties clearly entered into a contract to resolve all pending disputes. As such, MCL 700.7111(2) was inapplicable to this case and the probate court erred by allowing for the sale of the Cedar Rest Resort in contravention of the parties' settlement agreement.

Because we conclude that the probate court erred by applying MCL 700.7111, we find it unnecessary to address the remainder of respondents' issues on appeal.

Reversed.

FORT HOOD, P.J., and K. F. KELLY and DONOFRIO, JJ., concurred.

GRAY v CHROSTOWSKI

Docket No. 303536. Submitted March 16, 2012, at Detroit. Decided December 6, 2012, at 9:05 a.m. Leave to appeal denied, 494 Mich 860.

Lindsey R. Gray brought an action in the Genesee Circuit Court against Gary A. Chrostowski, seeking to recover damages under the no-fault act, MCL 500.3101 *et seq*. Plaintiff alleged that defendant intentionally and purposefully collided with her car while both parties were driving on the highway. At the time of the accident plaintiff's vehicle was uninsured. Defendant filed a motion for partial summary disposition, arguing that plaintiff was barred from recovering noneconomic benefits under MCL 500.3135(2)(c) because she did not have security for the vehicle at the time of the accident as required by MCL 500.3101. The court, Judith A. Fullerton, J., agreed and granted defendant partial summary disposition, concluding that plaintiff's failure to maintain insurance coverage on her vehicle precluded recovery of noneconomic damages under MCL 500.3135(2)(c). Plaintiff appealed.

The Court of Appeals *held*:

There are two exceptions to the general rule that the no-fault act abolished tort liability for harm caused while owning, maintaining, or using a motor vehicle in Michigan. The threshold exception to tort immunity, MCL 500.3135(1), allows an injured party to recover damages for noneconomic losses if he or she has suffered death, serious impairment of body function, or permanent serious disfigurement. The intentional-act exception, MCL 500.3135(3)(a), allows an injured party to recover noneconomic damages from the at-fault driver if he or she intentionally caused the harm to person or property. However, the uninsured-motorist restriction, MCL 500.3135(2)(c), states that damages may not be assessed to a party if he or she did not have insurance as security in effect at the time the injury occurred. The court erred by granting defendant partial summary disposition. The language of the uninsured-motorist restriction clearly refers to the threshold exception, and the restriction applies only to tort claims arising under the threshold exception, MCL 500.3135(1), of the no-fault act. The court also erred by concluding that the uninsured-

motorist restriction barred plaintiff from recovering noneconomic damages for defendant's alleged intentional acts under § 3135(3)(a). The language of MCL 500.3135(3)(a) explicitly provides that in spite of any other provision of law, the no-fault act's grant of immunity from tort liability does not extend to liability arising from a defendant's intentional conduct.

Reversed and remanded for further proceedings.

INSURANCE — NO-FAULT — TORT LIABILITY — UNINSURED-MOTORIST RESTRICTION — INTENTIONALLY CAUSED HARM.

There are two exceptions to the general rule that the no-fault act abolished tort liability for harm caused while owning, maintaining, or using a motor vehicle in Michigan; the threshold exception to tort immunity, MCL 500.3135(1), allows an injured party to recover damages for noneconomic losses if he or she has suffered death, serious impairment of body function, or permanent serious disfigurement; the intentional-act exception, MCL 500.3135(3)(a), allows an injured party to recover noneconomic damages if the at-fault driver intentionally caused the harm to person or property; the uninsured-motorist restriction, MCL 500.3135(2)(c), states that damages may not be assessed in favor of a party if he or she did not have insurance as security in effect at the time the injury occurred; the uninsured-motorist restriction applies only to tort claims arising under the threshold exception, MCL 500.3135(1) of the no-fault act; the language of MCL 500.3135(3)(a) explicitly provides that in spite of any other provision of law, the no-fault act's grant of immunity from tort liability does not extend to liability arising from a defendant's intentional conduct.

Peter M. Bade for Lindsey R. Gray.

*Law Office of Joseph S. Harrison, P.C. (*by *Joseph S. Harrison*), for Gary A. Chrostowski.

Before: BORRELLO, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM. Plaintiff appeals as of right the trial court's order granting defendant partial summary disposition pursuant to MCR 2.116(C)(10). The trial court granted defendant's motion after concluding that plaintiff's cause of action was barred under MCL 500.3135(2)(c), a provi-

sion of the no-fault act, because plaintiff's vehicle was uninsured at the time defendant is alleged to have intentionally driven his vehicle into plaintiff's vehicle causing an accident that resulted in damages. For the reasons set forth in this opinion, we reverse the trial court's order and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

On August 19, 2010, plaintiff filed a complaint seeking to recover noneconomic damages[1] arising from an alleged incident of "road rage." Specifically, plaintiff alleged that on January 2, 2009, she was driving a Honda Civic northbound on the inside lane of US-23, a two-lane highway located in Livingston County, when defendant quickly approached her vehicle and began to tailgate her. Plaintiff claimed that defendant drove his vehicle into the outside lane, drove parallel to her vehicle and glared angrily at her. Plaintiff alleged that defendant then, "intentionally turned his vehicle directly into the path of plaintiff's vehicle," and "purposefully" collided with plaintiff's vehicle causing her to lose control of the vehicle and violently crash into the median. Plaintiff claimed that defendant "intentionally and purposefully" caused her harm. In an affidavit, plaintiff claimed that at the time of the accident, defendant "appeared to be extremely angry and highly agitated" and he made an "aggressive, threatening gesture" at plaintiff. According to plaintiff, defendant then "purposefully turned his vehicle into my lane, as if to bump me out of his way" and defendant's vehicle struck the right side of plaintiff's vehicle.

[1] The parties stipulated to dismiss plaintiff's claims for economic damages.

Michael Fontaine, an eyewitness, averred in an affidavit that he was driving on US-23 on the day of the incident when he saw the driver of a black Kia Spectra operating his vehicle at a high rate of speed in an "extremely hazardous manner." Fontaine stated that the Kia swerved in front of his vehicle and "overcompensated by turning sharply to the left." According to Fontaine, the Kia then collided with a Honda Civic causing the Civic to violently crash into the median. After the accident, Fontaine observed the driver of the Kia stop his vehicle and look in the direction of the Civic before fleeing the scene. Another witness, Ty Hovey, averred in an affidavit that he observed the driver of a black Kia Spectra pull into a Mobil gas station at or about the time of the accident on January 2, 2009. Hovey averred that the Kia had a flat tire and the driver of the vehicle asked him for a ride to Fenton. Hovey agreed, and stated that during the ride to Fenton, he noticed the man smelled of alcohol, had glassy eyes and slurred speech, and was not fully coherent.

After plaintiff admitted in a response to an interrogatory that her vehicle was uninsured at the time of the incident, defendant moved for partial summary disposition. Resolution of defendant's motion turned on the trial court's application of MCL 500.3101(1) and MCL 500.3135, provisions of the no-fault act, MCL 500.3101 *et seq*. Specifically, MCL 500.3101(1) requires motorists to maintain no-fault insurance coverage on their vehicles whenever the vehicle is "driven or moved upon a highway." MCL 500.3135 provides motorists a cause of action in tort for the recovery of noneconomic damages arising from an automobile accident as follows:

> (1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has

> suffered death, serious impairment of body function, or permanent serious disfigurement.
>
> (2) For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, all of the following apply:
>
> * * *
>
> (c) Damages shall not be assessed in favor of a party who was operating his or her own vehicle at the time the injury occurred *and did not have in effect for that motor vehicle the security required* by [MCL 500.3101] at the time the injury occurred.
>
> (3) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by [MCL 500.3101] was in effect is abolished *except as to*:
>
> (a) Intentionally caused harm to persons or property. . . .
>
> (b) Damages for noneconomic loss as provided and limited in subsections (1) and (2). [Emphasis added.]

Defendant argued that because plaintiff did not maintain insurance on her vehicle at the time of the accident, as required under MCL 500.3101, plaintiff was precluded from recovering non-economic damages pursuant to MCL 500.3135(2)(c). Plaintiff responded, arguing that defendant did not have any tort immunity under the no-fault act because defendant had intentionally caused her harm. Plaintiff further argued that although the no-fault act abolished tort liability in general, pursuant to MCL 500.3135(3)(a), the no-fault act did not abolish tort liability for damages arising from "intentionally caused harm to persons or property." Plaintiff claimed that her cause of action did not arise under the no-fault act, but rather involved an intentional tort—assault and battery; therefore, MCL 500.3135(2)(c) did not preclude recovery.

Following a hearing in which both parties reasserted their arguments, the trial court granted defendant's motion for partial summary disposition. The trial court concluded that plaintiff's failure to maintain insurance coverage for her vehicle precluded her recovery of noneconomic damages under MCL 500.3135(2)(c). The court concluded, "you can't bring an action - - any type of action on a motor vehicle . . . without having a security in place." This appeal ensued.

II. STANDARD OF REVIEW

On appeal, plaintiff contends that the trial court erred in holding that her cause of action was barred under MCL 500.3135(2)(c) and erred in granting defendant's motion for partial summary disposition on that basis.

We review de novo a trial court's ruling on a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In reviewing a motion under MCR 2.116(C)(10), we review the evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact. *Id*. at 120. "A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ." *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006). Summary disposition is appropriate "[w]here the proffered evidence fails to establish a genuine issue regarding any material fact, [and] the moving party is entitled to judgment as a matter of law." *Maiden*, 461 Mich at 120.

This case requires that we interpret and apply the applicable provisions of the no-fault act. The construction and application of a statute involves questions of law that we review de novo. *Klooster v City of Char-*

levoix, 488 Mich 289, 295; 795 NW2d 578 (2011). "The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Id*. at 296. "Statutory provisions must be read in the context of the entire act, giving every word its plain and ordinary meaning." *Driver v Naini*, 490 Mich 239, 247; 802 NW2d 311 (2011). "When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Id*.

III. ANALYSIS

Apart from certain enumerated exceptions, the no-fault act "abolished tort liability for harm caused while owning, maintaining, or using a motor vehicle in Michigan." *American Alternative Ins Co, Inc v York*, 470 Mich 28, 30; 679 NW2d 306 (2004). However, relevant to this case, the Legislature included two exceptions to the broad grant of immunity that allow an injured motorist to recover noneconomic damages arising from the use, operation, or maintenance of an automobile. *Id*. at 30-32. In particular, MCL 500.3135(1) provides a threshold exception to tort immunity in relevant part as follows:

> (1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

In addition to the threshold exception, MCL 500.3135(3) provides in relevant part as follows:

> (3) *Notwithstanding any other provision of law*, *tort liability* arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by [MCL 500.3101] was in effect *is abolished except as to*:

> (a) *Intentionally caused harm to persons or property*. . . .
>
> (b) Damages for noneconomic loss as provided and limited in subsections (1) and (2). [Emphasis added.]

Although the Legislature included both the threshold exception and the intentional-act exception to general tort immunity in MCL 500.3135, subsection (2) of that section precludes an uninsured motorist from recovering noneconomic damages in relevant part as follows:

> (2) For a cause of action for damages pursuant to [MCL 500.3135(1)] filed on or after July 26, 1996, all of the following apply:
>
> * * *
>
> (c) Damages shall not be assessed in favor of a party who was operating his or her own vehicle at the time the injury occurred and did not have in effect for that motor vehicle the security required by [MCL 500.3101] at the time the injury occurred.

The scope of this restriction is at issue in the present case. Specifically, defendant contends that MCL 500.3135(2)(c) precludes an uninsured motorist from recovering noneconomic damages arising from an automobile accident, irrespective of whether the plaintiff's action arises under the threshold exception, i.e., MCL 500.3135(1), or the intentional-act exception under MCL 500.3135(3)(a). Plaintiff, in contrast, argues that the uninsured-motorist restriction in MCL 500.3135(2)(c) is limited to claims that arise under the threshold exception, whereas claims to recover damages for intentionally caused harm involve tort claims that arise outside the no-fault act and are not limited by the uninsured-motorist restriction. Given these conflicting arguments, we proceed with a closer examination of the language of the applicable statutory provisions.

A plain reading of the language in MCL 500.3135(2)

indicates that the uninsured-motorist restriction is limited to claims arising under MCL 500.3135(1), i.e. the threshold exception. In particular, the first sentence of subsection (2) states, "For a cause of action for damages *pursuant to subsection (1)* . . . , all of the following apply[.]" This language clearly limits the scope of subsection (2) to threshold claims arising under subsection (1). Specifically, the phrase "pursuant to" is defined in relevant part as "[i]n compliance with; in accordance with; under[;] . . . [a]s authorized by . . . ." Black's Law Dictionary (9th ed). See *Risko v Grand Haven Charter Twp Zoning Bd of Appeals*, 284 Mich App 453, 460; 773 NW2d 730 (2009) ("Because undefined terms must be given their plain and ordinary meanings, it is proper to consult a dictionary to define terms."). Thus, the statutory language in § 3135(2) clearly indicates that the uninsured-motorist restriction set forth in subsection (2)(c) is exclusive to actions that arise under § 3135(1). The restriction has no bearing on a cause of action to recover for intentionally caused harm. See *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002) ("The Legislature is presumed to have intended the meaning it plainly expressed . . . ."). Indeed, had the Legislature intended to limit an uninsured motorist's ability to recover damages arising from intentionally caused harm, it could have included language in subsection (2) indicating as much. Instead, subsection (2)'s exclusive reference to subsection (1) is indicative of the Legislature's intent that subsection (2)(c) apply solely to threshold claims arising under subsection (1). See *Hoerstman Gen Contracting, Inc, v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) (noting that under the maxim *expressio unius est exclusio alterius*, the express reference of one thing in a statutory provision implies the exclusion of other similar things).

Moreover, the language in MCL 500.3135(3) indicates that the uninsured-motorist restriction in § 3135(2)(c) is

inapplicable in instances in which a plaintiff files a claim to recover damages arising from intentionally caused harm. Specifically, MCL 500.3135(3)(a) provides: "[*N*]*otwithstanding any other provision of law*, tort liability . . . is abolished *except as to* . . . [intentionally caused harm]." (emphasis added). This language is broad and unequivocal. "Notwithstanding" means "in spite of; without being opposed or prevented by[.]" *Random House Webster's College Dictionary* (1997). Accordingly, pursuant to the explicit language of subsection (3), irrespective of or in spite of any other provision of law, including § 3135(2)(c) and other provisions of the no-fault act, tort liability remains in effect for intentionally caused harm. The no-fault act's grant of immunity does not extend to tort liability arising from a defendant's intentional conduct. As noted by our Supreme Court: "The Legislature, in speaking so clearly in § 3135(3), made unmistakable its intent to define where immunity was lost. As set out in the statute, the test is: was the harm intentionally caused." *American Alternative Ins Co*, 470 Mich at 32; see also, *Hicks v Vaught*, 162 Mich App 438, 439-440; 413 NW2d 28 (1987) (noting that then MCL 500.3135(2)(a), now codified in MCL 500.3135(3)(a), unambiguously requires a person to intend to do harm to another person for the provision to apply).

Further, while § 3135(3)(b) provides that tort liability is abolished except as to "damages for noneconomic loss *as provided and limited in* [*MCL 500.3135(1) and (2)*]," that paragraph does not limit recovery of noneconomic damages that arise from intentionally caused harm. (Emphasis added.) As noted, § 3135(3)(a) strips a defendant of tort immunity for intentionally caused harm "notwithstanding any other provision of law." There is no limiting language placed in this provision and there is no other language that indicates the Legislature intended the provision to be contingent on the uninsured-motorist restric-

tion set forth in § 3135(2)(c). In addition, as previously discussed, the plain language of § 3135(2) indicates that the uninsured-motorist restriction is limited to claims arising under the threshold exception in § 3135(1). Accordingly, we decline to read a restriction into § 3135(3)(a) because it is not contained in the plain language of that portion of the statute. See *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002) ("[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.").

In sum, pursuant to the plain language of the statutory provisions at issue, we conclude that MCL 500.3135(2)(c) bars an uninsured motorist from recovering noneconomic damages for claims that arise under the threshold exception to tort immunity set forth in MCL 500.3135(1). In contrast, MCL 500.3135(2)(c) does not preclude an uninsured motorist from recovering noneconomic damages arising from intentionally caused harm under MCL 500.3135(3)(a). Accordingly, in this case, the trial court erred when it concluded plaintiff's claim was barred pursuant to MCL 500.3135(2)(c), and erred by granting defendant's motion for partial summary disposition on that basis. Therefore, reversal and remand for further proceedings is appropriate.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff having prevailed, may tax costs pursuant to MCR 7.219.

BORRELLO, P.J., and BECKERING and GLEICHER, JJ., concurred.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Court of general interest to the bench and bar of the state.

Order Entered December 14, 2012:

FRADCO, INC v DEPARTMENT OF TREASURY, Docket No. 306617. Reported at 298 Mich App 292. The motion for reconsideration is denied. The Court orders that the motion for stay is denied. The Court orders that the motion for immediate consideration is granted.

The motion for clarification is granted in part to correct this Court's inadvertent reference to the Tax Tribunal rather than the Department of Treasury. In all other respects, the motion for clarification is denied. The first sentence of the last paragraph on page 2 of the slip opinion* is amended to read as follows: "The issue before us today is when the 35-day period under MCL 205.22 begins to run if the taxpayer has previously filed a written request with the Treasury to send copies of all letters and notices to the taxpayer's representatives."

RIORDAN, J., would grant the motion for stay.

Order Entered December 14, 2012:

SMK, LLC v DEPARTMENT OF TREASURY, Docket No. 306639. Reported at 298 Mich App 302. The Court orders that the motion for stay is denied. The Court orders that the motion for immediate consideration is granted.

The motion for clarification is granted in part to correct this Court's inadvertent reference to the Tax Tribunal rather than the Department of Treasury. In all other respects, the motion for clarification is denied. The first sentence of the last paragraph on page 2 of the slip opinion** is amended to read as follows: "The issue before us today is when the 35-day period under MCL 205.22 begins to run if the taxpayer has previously filed a written request with the Treasury to send copies of all letters and notices to the taxpayer's representatives."

RIORDAN, J., would grant the motion for stay.

Order Entered November 6, 2012:

ADAIR v STATE OF MICHIGAN, Docket No. 230858. Pursuant to the opinion issued concurrently with this order,*** this case is referred to Special Master A. David Baumhart, III, for further proceedings consistent with the opinion of this Court. We retain justidiction.

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* See 298 Mich App 292, 296—REPORTER.

** See 298 Mich App 302, 306—REPORTER.

*** Reported at 298 Mich App 383—REPORTER.

Proceedings on referral in this matter shall commence within 21 days of the Clerk's certification of this order, and they shall be given priority until they are concluded. As stated in the accompanying opinion, the special master shall take additional proofs and reassess which costs incurred by plaintiffs in phases I and II of these proceedings were necessary to the maintenance of the suit and reasonable. The proceedings before the special master are limited to this issue only. The parties shall file with this Court a copy of all pleadings and documents filed with the special master. The special master's findings of fact and other determinations shall be made in a written report to be filed with this Court. Transcripts of the proceedings before the special master shall be transmitted to this Court within 21 days after the issuance of the special master's report. The parties shall have 21 days from the filing of the transcripts in which to file objections to the special master's report. The objections shall be accompanied by a supporting brief and exhibits. Answers to the objections made by opposing parties shall be filed within 14 days of the filing of the objections.

Order Entered November 30, 2012:

ADAIR V STATE OF MICHIGAN, Docket No. 230858. Pursuant to the stipulation of the parties, the Court vacates its November 6, 2012, order referring this matter to the special master, the parties having settled the claim for litigation expenses incurred in this suit from its filing on November 15, 2000, through July 14, 2010.

The Court further denies the motion to stay proceedings before the special master as moot.

Order Entered December 20, 2012:

ANGELUCCI V DART PROPERTIES INCORPORATED, Docket No. 305688. Reported at 298 Mich App 592. The Court orders that a special panel shall be convened pursuant to MCR 7.215(J) to resolve the conflict between this case and *Provider Creditors Comm v United American Health Care Corp*, 275 Mich App 90, 94; 738 NW2d 770 (2007).

The Court further orders that part III of the opinion in this case, released on November 29, 2012, is vacated. MCR 7.215(J)(5).

Appellant may file a supplemental brief within 21 days of the Clerk's certification of this order. Appellees may file a supplemental brief within 21 days of the service of appellant's brief.

Order Entered December 27, 2012:

ANGELUCCI V DART PROPERTIES INCORPORATED, Docket No. 305688. Reported at 298 Mich App 592. The Court orders that the motion to assess attorney fees is denied for the reason that the issue is moot. Part III of the opinion in this case, released on November 29, 2012, is vacated. MCR 7.215(J)(5). The matter will proceed to a conflict resolution panel. MCR 7.215(J).

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1. A claim is not ripe if it rests upon contingent future events that may not occur as anticipated or may not occur at all; for a claim to be ripe there must be a genuine case or controversy between the parties in which there is a real rather than a hypothetical dispute; a motor vehicle dealer may file a declaratory action under MCL 445.1576(3) to determine whether there is good cause to establish a new motor vehicle dealer in the relevant market area where the same vehicle line make is represented after receiving notice that a motor vehicle manufacturer or distributor intends to do so. *LaFontaine Saline Inc v Chrysler Group LLC*, 298 Mich App 576.

ACTIONS TO ENFORCE HEADLEE AMENDMENT—*See*

CONSTITUTIONAL LAW 6

ADMINISTRATIVE LAW

RULEMAKING

1. Any rule that an administrative agency issues without exercising delegated legislative power is an interpretive rule; interpretive rules interpret and apply the provisions of a statute under which the agency in question operates and are invalid if they do more than specify the application of a legislative purpose implicit in the general language used by the Legislature, if they conflict with the governing

statute, if they extend or modify the statute, or if they have no reasonable relationship to a statutory purpose. *Discount Tire Co v Dep't of Treasury*, 298 Mich App 367.

TAXATION

2. Mich Admin Code, R 205.16 was issued as an interpretive rule by the Department of Treasury to clarify the meaning of the term "returned goods" in § 6b of the General Sales Tax Act, which provides that a taxpayer may claim a credit or refund for returned goods; Rule 16 changes the scope of, modifies, and narrows the returned-goods credit provided for in § 6b and contains far more restrictive language and is thus not a valid interpretive rule (MCL 205.56b). *Discount Tire Co v Dep't of Treasury*, 298 Mich App 367.

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See, also, DIVORCE 1

TAXATION 1, 2, 3, 4

APPLICATIONS FOR LEAVE TO APPEAL

1. MCL 600.321 requires that a fee be paid to the clerk of the Court of Appeals for an appeal as of right, for an application for leave to appeal, or for an original proceeding; this fee must be paid for each order being appealed regardless of whether only one application was filed. *City of Westland v Kodlowski*, 298 Mich App 647.

CIRCUIT COURTS

2. MCR 7.101(K) provides that a party who has filed a timely brief on appeal from the district court to the circuit court is entitled to oral argument if the party requested it in boldface type on the title page of the party's brief; violations of a party's right to oral argument under MCR 7.101(K) are not grounds for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order unless refusal to take that action appears to the court inconsistent with substantial justice. *City of Westland v Kodlowski*, 298 Mich App 647.

APPEAL OF PAROLE BOARD DECISIONS—*See*

COURTS 1

PAROLE 2

APPEAL OF PAROLE ORDERS—*See*

PAROLE 1

APPLICATIONS FOR LEAVE TO APPEAL—*See*

APPEAL 1

APPOINTMENT OF COUNSEL FOR PAROLE—*See*

COURTS 1

PAROLE 1, 2

APPRAISALS OF DAMAGES—*See*

INSURANCE 1

APPROPRIATE CAPABILITY OF WIND ENERGY TRANSMISSION LINES—*See*

PUBLIC UTILITIES 3

APPROVAL OF AGREEMENTS ADJUSTING BENEFICIAL INTERESTS—*See*

TRUSTS 1

ARBITRATION—*See*
COSTS 1
ARCHITECTS—*See*
LIMITATION OF ACTIONS 1
ARISING OUT OF DEFINED—*See*
SENTENCES 5
ASSAULT—*See*
EVIDENCE 2
ASSESSMENTS—*See*
TAXATION 1, 3
ASSIGNMENT OF FIRST MORTGAGES—*See*
CONDOMINIUMS 1
ASSISTANCE OF COUNSEL—*See*
CONSTITUTIONAL LAW 4
ASSISTANCE TO VICTIMS AS DEPARTURE FACTOR—*See*
SENTENCES 9
ATTORNEY AND CLIENT—*See*
CONSTITUTIONAL LAW 4
CRIMINAL LAW 1
TRIAL 1
ATTORNEY FEES
See, also, INSURANCE 6
TRIAL 1
DIVORCE
1. *Loutts v Loutts*, 298 Mich App 21.
AUDIO RECORDINGS—*See*
EVIDENCE 1
AUTOMOBILES—*See*
ACTIONS 1
CRIMINAL LAW 7
INSURANCE 4, 5, 6, 7

AWARDS OF COSTS—*See*
CONSTITUTIONAL LAW 5

BATTERY—*See*
EVIDENCE 2

BENEFICIARIES—*See*
TRUSTS 1

BOARDS OF COUNTY COMMISSIONERS—*See*
COUNTIES 1

BREAKDOWN OF ATTORNEY-CLIENT RELATIONSHIP—*See*
CRIMINAL LAW 1

BUILDING CONTRACTORS—*See*
LIMITATION OF ACTIONS 1

BURDEN OF PROOF OF RETALIATORY DISCHARGE—*See*
WORKERS' COMPENSATION 2

BUSINESS-USE EXCLUSION—*See*
INSURANCE 3

CALCULATION OF COURT COSTS—*See*
CRIMINAL LAW 3

CAPITALIZATION OF COSTS—*See*
TAXATION 12

CASE EVALUATION AWARDS—*See*
COSTS 1

CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY—*See*
PUBLIC UTILITIES 1

CHANGE OF VENUE—*See*
VENUE 1

CHARGES RELATED TO CONTROLLED SUBSTANCES—*See*

CONTROLLED SUBSTANCES 1

CHARTER COUNTIES—*See*

COUNTIES 1

CHILD ABUSE—*See*

CRIMINAL LAW 2

CHILD SUPPORT—*See*

JUDGMENTS 1

CIRCUIT COURTS—*See*

APPEAL 1

COURTS 1

CIVIL SERVICE

CIVIL SERVICE COMMISSION

1. In deciding whether an applicant has qualified for long-term disability insurance benefits, the Civil Service Commission is not required to consider the disability findings of the Social Security Administration or the State Employees' Retirement System Board regarding that applicant. *Wescott v Civil Service Comm*, 298 Mich App 158.

CODE OF CRIMINAL PROCEDURE—*See*

CRIMINAL LAW 5

COLLATERAL REVIEW UNDER NEW CRIMINAL PROCEDURE RULE—*See*

CONSTITUTIONAL LAW 10

COMITY—*See*

JUDGMENTS 1

COMMENTS REGARDING EVIDENCE AND CREDIBILITY—*See*

PROSECUTING ATTORNEYS 1

COMMERCIAL INSURANCE POLICIES—*See*

INSURANCE 2

COMMUNICATIONS WITH JURY—*See*

JURY 1

COMPACTS WITH TRIBES—*See*

INDIANS 1

CONDOMINIUMS

MORTGAGES

1. The Condominium Act, MCL 559.101 *et seq*., provides that a first mortgage of record has priority over a condominium-association lien if the first mortgage of record was recorded before the condominium-association lien; a first mortgage of record for purposes of the Condominium Act is a mortgage that is recorded before all others with respect to time pursuant to the laws of this state relating to the recording of deeds; the assignment of a first mortgage of record does not affect its priority under the Condominium Act (MCL 559.208[1]). *Coventry Parkhomes Condominium Ass'n v Federal National Mortgage Ass'n*, 298 Mich App 252.

CONFLICT OF LAWS—*See*

TAXATION 5, 6

CONSENT TO SEARCHES—*See*

CONSTITUTIONAL LAW 8

CONSTITUTIONAL LAW

See, also, CRIMINAL LAW 1, 8

PAROLE 1, 2

STATUTES 1

WEAPONS 1

DOUBLE JEOPARDY

1. The United States and Michigan Constitutions both protect an individual from being placed twice in jeopardy for the same offense; the protections afforded by the double jeopardy bar include the prevention of multiple punishments for the same conduct; whether a defendant has received multiple punishments for the same conduct is generally determined under the same-elements test, which requires the reviewing court to determine whether each statute requires proof of a fact

that the other does not; there is, however, no double jeopardy violation if the legislative intent clearly authorizes cumulative or multiple punishments; when one statute incorporates most of the elements of a base statute and adds an aggravating conduct element with an increased penalty compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes; the offense of indecent exposure does not contain any elements that are distinct from the offense of aggravated indecent exposure and a defendant may not be convicted of both offenses for the same conduct (US Const, Am V; Const 1963, art 1, § 15; MCL 750.335a). *People v Franklin*, 298 Mich App 539.

DUE PROCESS

2. Substantive due process protects individual liberty and property interests from arbitrary government actions regardless of the fairness of any implementing procedures; the right to substantive due process is violated when legislation is unreasonable and clearly arbitrary, having no substantial relationship to the health, safety, morals, and general welfare of the public; it is a permissible legislative objective for a city to demolish unsafe and dangerous structures to protect its citizens; a zoning code section violates substantive due process if it arbitrarily and unreasonably denies a property owner the option to repair an unsafe structure rather than ordering demolition with no option to repair simply on the basis that the city deems repair efforts to be economically unreasonable (US Const, Am XIV; Const 1963, art 1, § 17). *Bonner v City of Brighton*, 298 Mich App 693.
3. Procedural due process requires that a person may not be deprived of his or her life, liberty, or property without due process of law; a procedural due process violation occurs when the government unlawfully interferes with a protected property or liberty interest without providing adequate procedural safeguards; a procedural due process claim is established by showing that a recognizable property or liberty interest was deprived under the color of state law without due process of law; before a governmental body issues an order to demolish an unsafe structure, property owners must be given an option to repair the unsafe structure, regardless of whether doing so might be viewed as economically

unreasonable (US Const, Am XIV; Const 1963, art 1, § 17). *Bonner v City of Brighton*, 298 Mich App 693.

EFFECTIVE ASSISTANCE OF COUNSEL

4. *People v Marshall*, 298 Mich App 607.

HEADLEE AMENDMENT

5. The term "maintain" in the provision of the Headlee Amendment governing the costs to be awarded to a taxpayer who sustains an action to enforce the provisions of the Headlee Amendment means, in the context of such an action, to commence, continue, and keep the suit from collapsing and to prosecute the suit to achieve an effect; the phrase "costs incurred in maintaining such suit" reflects an intended trial orientation to the provision, indicating that the ratifiers of the amendment did not intend that the authority to award costs under the provision extend to postjudgment proceedings (Const 1963, art 9, § 32). *Adair v Michigan (On Third Remand)*, 298 Mich App 383.

6. The "costs" recoverable under the provision of the Headlee Amendment governing the costs to be awarded to a taxpayer who sustains an action to enforce the provisions of the amendment are not limited to the ordinary statutorily authorized costs; awardable costs are those costs incurred by the taxpayer that were necessary to the maintenance of the suit and were reasonable; costs incurred in postjudgment proceedings are not awardable under the provision (Const 1963, art 9, § 32). *Adair v Michigan (On Third Remand)*, 298 Mich App 383.

PREEMPTION OF LOCAL REGULATIONS

7. A state statutory scheme preempts regulation by a lower-level governmental entity when the local regulation directly conflicts with the state statutory scheme or the state statutory scheme occupies the field of regulation that the lower level government entity seeks to enter, even if there is no direct conflict between the two schemes of regulation; a state statutory scheme is preemptive if it expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive; preemption may be implied from a consideration of whether the legislative history of the state statutory scheme supports it, whether the scheme is pervasive, and whether the nature of the regulated

subject matter demands exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. *Capital Area Dist Library v Michigan Open Carry, Inc*, 298 Mich App 220.

SEARCHES AND SEIZURES

8. The United States and Michigan Constitutions guarantee the right to be free from unreasonable searches and seizures; warrantless searches and seizures are generally unreasonable per se; an otherwise unreasonable search and seizure may be rendered valid by voluntary consent that is given freely, intelligently, specifically, and unequivocally; consent may be limited in scope, may be revoked, and is valid if obtained from the person whose property is to be searched or from a third party that has common authority over the property; an occupant who is present on the premises may invalidate the consent given by another occupant by expressly objecting to the search if the police are entering to search for evidence; an occupant's withdrawal of consent, however, does not preclude officers from continuing to investigate cases of potential domestic violence (US Const; Am IV, Const 1963, art 1, § 11). *City of Westland v Kodlowski*, 298 Mich App 647.

SENTENCES

9. The Eighth Amendment requires that juveniles under the age of 18 be treated differently than adults when being sentenced; a sentencing scheme that mandates life in prison without parole for juvenile offenders constitutes cruel and unusual punishment under the Eighth Amendment; mandatorily sentencing a juvenile offender to life in prison without parole is not proportionate because it would not allow the sentencing court to consider the special characteristics of youth or the circumstances of the offense when imposing sentence; at sentencing, a court should consider (1) the character and record of the defendant and the circumstances of the offense, (2) the chronological age of the minor defendant, (3) the background and mental and emotional development of a youthful defendant, (4) the family and home environment, (5) the circumstances of the homicide offense, including the extent of the juvenile defendant's participation in the offense and the way family and peer pressures might have affected him or her, (6) whether the juvenile defendant might have been charged and convicted of a lesser offense if not for the

incompetencies associated with youth, and (7) the potential for rehabilitation. *People v Carp*, 298 Mich App 472.

10. Unless an exception applies, new constitutional rules of criminal procedure may not be applied retroactively on collateral review; a new rule should be applied retroactively on collateral review if it requires the observance of those procedures that are substantive or if it is a watershed rule of criminal procedure that implicates the fundamental fairness and accuracy of the criminal proceeding; a watershed rule is one that is necessary to prevent an impermissibly large risk of an inaccurate conviction and alters the bedrock procedural elements essential to the fairness of a proceeding; under federal and Michigan law, the prohibition against mandatory life in prison without parole for juvenile homicide offenders applies to cases currently pending on direct appeal, but may not be applied retroactively to criminal cases on collateral review. *People v Carp*, 298 Mich App 472.

CONSTRUCTION OF CONTRACTS—*See*

INSURANCE 3

CONSTRUCTION OF WIND ENERGY TRANSMISSION LINES—*See*

PUBLIC UTILITIES 1, 2, 3

CONTINUATION OF EMPLOYMENT RELATIONSHIP AS ESTOPPEL—*See*

ESTOPPEL 1

CONTRACTS

See, also, COURTS 3

INSURANCE 3

STATUTES CREATING CONTRACTS

1. *Hardaway v Wayne County*, 298 Mich App 282.

CONTROLLED SUBSTANCES

CHARGES RELATED TO CONTROLLED SUBSTANCES

1. Under MCL 333.7105(1), the words "deliver" or "delivery" are defined as the actual, constructive, or attempted transfer from 1 person to another of a controlled substance; the singular form of "transfer" indicates that delivery refers to a single transfer, not

multiple transfers over a period of time; under MCL 333.7401(2)(a), the level of charges for the manufacturing, creating, delivering, or possession with intent to manufacture, create, or deliver a schedule 1 or 2 controlled substance are differentiated on the basis of the amount of controlled substance involved; a more severe punishment is imposed on those who manufacture, create, deliver, or possess greater amounts; a prosecutor may not aggregate various smaller deliveries of a controlled substance to support an increase in the level of the charged offense. *People v Collins*, 298 Mich App 458.

MARIJUANA

2. To assert a valid § 8 affirmative defense, MCL 333.26428(a)(2), under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., a defendant does not have to satisfy the requirements of § 4 of the MMMA, MCL 333.26424, which provides immunity from prosecution; a § 8 defense must be raised by the defendant in a pretrial motion for an evidentiary hearing and the defendant bears the burden at the hearing of establishing each of the elements in § 8(a); without weighing the evidence, assessing credibility, or resolving factual disputes at the hearing, the trial court must dismiss the charges if after the hearing the court concludes that the defendant has made a prima facie showing as to the elements in § 8(a) and that there are no material factual disputes on those elements; alternatively, if the defendant fails to establish one or more elements of the § 8(a) defense at the hearing, the trial court must deny the defendant's motion for dismissal and the defendant is prohibited from presenting a § 8 defense at trial; however, if the defendant presents sufficient evidence to establish each of the elements of a § 8 defense, but there are material questions of fact on one or more elements, then the trial court must deny the motion to dismiss and the affirmative defense must be submitted to the jury; the Court of Appeals reviews the evidence de novo to determine whether the trial court properly granted or denied the defendant's motion to dismiss under § 8. *People v Anderson (On Remand)*, 298 Mich App 10.

CORPORATIONS—*See*

INSURANCE 5

COSTS

See, also, CRIMINAL LAW 3

MEDIATION SANCTIONS

1. A judgment or order that is entered pursuant to an arbitration or settlement is not a "verdict" within the meaning of MCR 2.403(O)(2)(c), which defines a verdict for purposes of determining the liability for costs of a party that rejected a case-evaluation award as, in part, a judgment entered as a result of a ruling on a motion after rejection of the case evaluation award; a trial court's order granting a party's motion for entry of judgment that merely confirms an appraisal award is not a verdict under the court rule. *Acorn Investment Co v Michigan Basic Property Ins Ass'n*, 298 Mich App 558.

COSTS FOR HEADLEE AMENDMENT ACTIONS—*See*

CONSTITUTIONAL LAW 6

COUNTIES

CHARTER COUNTIES

1. For counties that have a population of fewer than 1.5 million, the county charter sets forth the respective authority, duties and responsibilities of the county executive and the county board of commissioners; the Legislature delegated the function of allocating power in a charter county to the charter commission first, subject to approval by the affected voters; county charter provisions are subject to the same rules of interpretation as are statutes and when charter language is unambiguous it controls. [MCL 45.514(1).] *Hackel v Macomb County Comm*, 298 Mich App 311.

COUNTY COMMISSIONS

2. *Hardaway v Wayne County*, 298 Mich App 282.

COUNTY COMMISSIONS—*See*

COUNTIES 2

COUNTY EXECUTIVES—*See*

COUNTIES 1

COURT-APPOINTED COUNSEL—*See*

CRIMINAL LAW 1

COURT COSTS—*See*

CRIMINAL LAW 3

COURT OF CLAIMS—*See*

TAXATION 1, 3

COURTS

See, also, JURISDICTION 1

TRUSTS 1, 2

CIRCUIT COURTS

1. Circuit courts have an inherent power to appoint counsel to represent indigent litigants to render justice in exceptional circumstances; circuit courts can direct and control the proceedings before them, make any order to effectuate their jurisdiction and have the authority to allocate previously apportioned funds in a manner it deems best to facilitate the fair and orderly disposition of its proceedings; a circuit court has discretion to use funds that had previously been apportioned for appointing appellate counsel for indigent defendants to appoint appellate counsel for a defendant during a prosecutor's appeal of a Parole Board order granting parole. *In re Parole of Hill*, 298 Mich App 404.

JUDICIAL FUNCTIONS

2. A function conferred on a court will not be regarded as nonjudicial as long as the court can function as a court in deciding the question, receiving and applying factual testimony against identifiable standards, laws, and rules of law. *In re Robert H Draves Trust*, 298 Mich App 745.

SETTLEMENT AGREEMENTS

3. An agreement to settle a pending lawsuit is a contract governed by the legal principles applicable to the construction and interpretation of contracts; courts are bound to enforce settlement agreements absent evidence showing fraud or duress or that the agreement violates the law or public policy. *In re Robert H Draves Trust*, 298 Mich App 745.

COVERAGE ISSUES—*See*

INSURANCE 1

COVERAGE FOR LOSSES DUE TO EMPLOYEE DISHONESTY—*See*

INSURANCE 2

CREDIBILITY OF WITNESSES—*See*

PROSECUTING ATTORNEYS 1

CRIMES COMMITTED BY NON-INDIANS ON INDIAN LAND—*See*

JURISDICTION 1

CRIMINAL DEFENSES—*See*

CONTROLLED SUBSTANCES 2

CRIMINAL JURISDICTION—*See*

INDIANS 1

CRIMINAL LAW

See, also, CONSTITUTIONAL LAW 1, 4
CONTROLLED SUBSTANCES 1, 2
HOMICIDE 1, 2
JURISDICTION 1
JURY 1
PROSECUTING ATTORNEYS 1
SENTENCES 1, 2, 4, 5, 6, 7, 8, 9, 10, 11

ATTORNEY AND CLIENT

1. A defendant is not entitled to have the attorney of his choice appointed simply by requesting the replacement of the attorney who was originally appointed; a defendant is entitled to substitution of appointed counsel only when discharge of the first attorney is for good cause and does not disrupt the judicial process; good cause is determined on the basis of the individual facts of each case; a complete breakdown of the attorney-client relationship or disagreement over whether a particular line of defense should be pursued may justify appointing new counsel; reversal is not required on the basis of an allegation of attorney disinterest unless the record shows that the lawyer assigned to represent the defendant was in fact inattentive to his or her responsibilities; substitution of counsel is not appropriate if the defendant deliberately caused the breakdown in the relationship by not cooperating with his counsel. *People v Buie (On Remand)*, 298 Mich App 50.

CHILD ABUSE

2. *People v Portellos*, 298 Mich App 431.

COSTS

3. *People v Sanders (After Remand)*, 298 Mich App 105.

CRIMINAL SEXUAL CONDUCT

4. Regardless of the ages of a defendant and his or her victim, MCL 750.520b(2) requires that a defendant convicted of first-degree criminal sexual conduct who is not sentenced to life in prison without the possibility of parole be sentenced to lifetime electronic monitoring in addition to any other penalty imposed (MCL 750.520n). *People v Johnson*, 298 Mich App 128.

EVIDENCE

5. MCL 768.27a allows the admission of evidence that a defendant charged with a sexual offense against a minor committed another sexual offense against a minor; however, under MRE 403 the probative value of such relevant evidence must not be substantially outweighed by the danger of unfair prejudice; although not exhaustive, for purposes of determining whether to admit other-acts evidence under MCL 768.27a, the court may consider (1) whether the other acts and the charged crime were dissimilar, (2) whether the other acts and the charged crime occurred in temporal proximity, (3) whether the other acts occurred infrequently, (4) whether there were intervening acts, (5) whether the evidence supporting the occurrence of the other acts was not reliable, and (6) whether there was a lack of need for evidence beyond the complainant's and the defendant's testimony. *People v Buie (On Remand)*, 298 Mich App 50.

INDECENT EXPOSURE

6. Under MCL 750.335a(2)(c), a person convicted of indecent exposure is subject to an indeterminate sentence of one day to a maximum of life in prison if the defendant was a sexually delinquent person at the time of the offense; MCL 750.10a defines a sexually delinquent person as any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sex relations of either a heterosexual or homosexual nature, or by the commission of sexual aggressions against children under the age of 16; MCL 767.61a states that when a defendant pleads guilty to

charges of both indecent exposure and being a sexually delinquent person, the court must conduct an examination of witnesses relative to the sexual delinquency of the person; this examination may take place at the plea hearing or later. *People v Franklin*, 298 Mich App 539.

OPERATING A MOTOR VEHICLE WHILE INTOXICATED

7. A person convicted of operating a motor vehicle while intoxicated with an occupant less than 16 years old, second offense, MCL 257.625(7)(a)(*ii*), shall be sentenced to either (1) imprisonment for not less than 1 year or more than 5 years' in prison, or (2) probation with imprisonment in the county jail for not less than 30 days or more than 1 year and community service for not less than 60 days or more than 180 days; the word "shall" indicates mandatory rather than discretionary action; the placement of an electronic-monitoring device on a defendant does not constitute imprisonment in the county jail as required by MCL 257.625(7)(a)(*ii*), because the tether program is a restriction, not a confinement or jail; a tether program is also not the equivalent of a traditional work-release program from a county jail, which is specifically authorized by MCL 801.252. *People v Pennebaker*, 298 Mich App 1.

VOIR DIRE

8. A defendant has the right to be present during voir dire; only a defendant may waive his statutory and constitutional right to be present during his or her trial; waiver occurs when the defendant intentionally, understandingly, and voluntarily relinquishes or abandons a known right; the waiver of the right to be present cannot be presumed from a silent record; a defendant can waive the right to be present at trial by voluntarily being absent after the trial has begun or by being so disorderly or disruptive that his trial cannot be continued while he is present. *People v Buie (On Remand)*, 298 Mich App 50.

CRIMINAL SEXUAL CONDUCT—*See*

CRIMINAL LAW 4, 5

CRUEL AND UNUSUAL PUNISHMENT—*See*

CONSTITUTIONAL LAW 9

DEADLY FORCE—*See*

GOVERNMENTAL IMMUNITY 1

DEALER AGREEMENTS—*See*
ACTIONS 1
DECISIONS OF THE DEPARTMENT OF TREASURY—*See*
TAXATION 1, 3
DECLARATORY ACTIONS—*See*
ACTIONS 1
DEFENSES—*See*
CONTROLLED SUBSTANCES 2
DELAY IN PAYMENTS—*See*
INSURANCE 6
DELEGATED LEGISLATIVE POWER—*See*
ADMINISTRATIVE LAW 1
DELIVERY DEFINED—*See*
CONTROLLED SUBSTANCES 1
DEMOLITION OF UNSAFE STRUCTURES—*See*
CONSTITUTIONAL LAW 2, 3
DENIAL OF BENEFITS—*See*
INSURANCE 6
DEPARTMENT OF TREASURY—*See*
ADMINISTRATIVE LAW 2
TAXATION 1, 2, 3, 4, 7, 8
DEPARTURES FROM SENTENCING GUIDELINES—*See*
SENTENCES 9
DEPRECIATION—*See*
TAXATION 12
DETRIMENTAL RELIANCE—*See*
ESTOPPEL 1
DISABILITY COMPENSATION—*See*
WORKERS' COMPENSATION 1, 2

DISABILITY FINDINGS OF OTHER GOVERNMENTAL AGENCIES—*See*

CIVIL SERVICE 1

DISHONEST ACTS OF EMPLOYEES—*See*

INSURANCE 2

DISMISSAL OF CHARGES—*See*

CONTROLLED SUBSTANCES 2

DISTRIBUTION OF MARTIAL ASSETS—*See*

DIVORCE 1

DISTRICT LIBRARIES—*See*

WEAPONS 1

DIVORCE

See, also, ATTORNEY FEES 1

DISTRIBUTION OF MARTIAL ASSETS

1. *Loutts v Loutts*, 298 Mich App 21.

SPOUSAL SUPPORT

2. The statute governing spousal support awards favors a case-by-case approach to determining spousal support and does not provide a strict formula to be followed; a trial court's decision to award spousal support is a discretionary decision that should reflect what is just and reasonable under the circumstances of the case; the parties are entitled to individual consideration based on the law and facts applicable to their case (MCL 552.23[1]). *Loutts v Loutts*, 298 Mich App 21.

DOMESTIC RELATIONS—*See*

DIVORCE 1, 2

DOMESTIC VIOLENCE—*See*

CONSTITUTIONAL LAW 8

DOUBLE JEOPARDY—*See*

CONSTITUTIONAL LAW 1

DRAIN CODE—*See*

DRAINS 1, 2, 3, 4

DRAINAGE BOARDS—*See*

DRAINS 5

DRAINS

DRAIN CODE

1. The provisions of § 121 of the Drain Code pertain to new drains rather than preexisting drains (MCL 280.121). *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200.
2. The provisions of subsections (4) and (5) of § 196 of the Drain Code regarding the maintenance and repair of a drain by a drainage board apply when a petition or resolution for such maintenance and repair has not been filed and are inapplicable when one has been filed (MCL 280.196[4] and [5]). *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200.
3. Section 192 of the Drain Code explicitly provides a method for initiating a drainage project with a petition signed solely by a city, village, or township when the project is necessary for the public health of one or more cities, villages, or townships; the fact that other provisions of the Drain Code provide alternative methods for initiating a drainage project does not negate or render nugatory the language of § 192; the statute also provides a second method for initiating a drainage project that allows a petition for the project to be signed by any combination of such municipalities if the municipalities will be liable to assessments at large for a percentage of the total amount to be assessed for the cost of the proposed work; the statutory language allowing a single city, village, or township to sign a petition does not render the statutory language permitting a combination of municipalities to sign a petition mere surplusage (MCL 280.192). *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200.
4. The Drain Code does not require a hearing to determine the proposed addition of land to a drainage district to be held before a hearing to determine the necessity of a proposed drainage project; a necessity hearing precedes a hearing to determine whether to add land to a drainage district (MCL 280.72; MCL 280.197). *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200.

DRAINAGE BOARDS

5. The purposes of a practicability hearing by a drainage board are to determine the sufficiency of the signatures on an application for a drainage project and to determine whether the proposed project is practicable; the scope of a proposed drainage project, including the area encompassed in the drainage district and the cost of the project, is not determined until a surveyor or engineer conducts a survey after the drainage board determines at a practicability hearing that the proposed project is practicable; a second practicability hearing is not required when such a survey results in an increase in the scope of the proposed project (MCL 280.103; MCL 280.104; MCL 280.192). *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200.

DRUNK DRIVING—*See*

CRIMINAL LAW 7

DUE PROCESS—*See*

CONSTITUTIONAL LAW 2, 3

PAROLE 2

EFFECT OF ADOPTION—*See*

PARENT AND CHILD 1

EFFECTIVE ASSISTANCE OF COUNSEL—*See*

CONSTITUTIONAL LAW 4

EIGHTH AMENDMENT—*See*

CONSTITUTIONAL LAW 9

ELECTRIC UTILITIES—*See*

PUBLIC UTILITIES 1

ELECTRONIC MONITORING DEVICES—*See*

CRIMINAL LAW 4, 7

ELEMENTS OF FIRST-DEGREE CHILD ABUSE—*See*

CRIMINAL LAW 2

ELEMENTS OF SECOND-DEGREE MURDER—*See*

HOMICIDE 2

EMBEZZLEMENT FROM PAYROLL ACCOUNTS—*See*
INSURANCE 2

EMERGENCY-SERVICES PERSONNEL—*See*
SENTENCES 11

EMPLOYEES—*See*
CIVIL SERVICE 1
INSURANCE 2

EMPLOYEES OF COUNTIES—*See*
COUNTIES 2

ENFORCEMENT OF CHILD SUPPORT ORDERS—*See*
JUDGMENTS 1

ENFORCEMENT OF SETTLEMENTS—*See*
COURTS 3

ENGINEERS—*See*
LIMITATION OF ACTIONS 1

EQUAL PROTECTION—*See*
PAROLE 1

ESTOPPEL
PROMISSORY ESTOPPEL
1. *Hardaway v Wayne County*, 298 Mich App 282.

EVIDENCE
See, also, CRIMINAL LAW 2, 5
HOMICIDE 2
PROSECUTING ATTORNEYS 1
ADMISSIBILITY OF EVIDENCE
1. Evidence offered to support a motion for summary disposition must be substantively admissible but need not be in admissible form (MCR 2.116[G][6]). *Latits v Phillips*, 298 Mich App 109.
RELEVANCE
2. Under MRE 402, all relevant evidence is admissible unless otherwise provided by constitution or court rule; relevant evidence is evidence that has any tendency to

make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence; evidence of a defendant's postarrest injuries is irrelevant to determining whether the defendant resisted arrest or committed an assault or battery; the right to present a defense extends only to relevant and admissible evidence. *City of Westland v Kodlowski*, 298 Mich App 647.

TRANSCRIPTS OF AUDIO RECORDINGS

3. A court should take steps to ensure the accuracy of a transcript of an audio recording before submitting the transcript to the jury; the preferred procedure is to have the parties stipulate the transcript's accuracy; absent a stipulation, a court may verify a transcript's accuracy by relying on the verification of the transcriber, by independently comparing the transcript with the audio recording, or by using other procedures that ensure the reliability of the transcript; a court may decline to admit a prepared transcript and instead allow the jury to determine the contents of an audio recording itself. *City of Westland v Kodlowski*, 298 Mich App 647.

EVIDENCE OF POSTARREST INJURIES—*See*

EVIDENCE 2

EVIDENCE OF TAXABLE VALUE—*See*

TAXATION 9

EVIDENTIARY HEARINGS—*See*

CONTROLLED SUBSTANCES 2

EXCLUDED DRIVERS—*See*

INSURANCE 4

EXCLUSIONS FROM COVERAGE—*See*

INSURANCE 3

EXERCISE OF INJURED EMPLOYEE'S RIGHT TO SEEK MEDICAL SERVICES—*See*

WORKERS' COMPENSATION 1

EXPEDITED SITING CERTIFICATES—*See*

PUBLIC UTILITIES 1, 2

EXTENDED RETIREMENT BENEFITS—*See*
COUNTIES 2

FACTORS FOR DETERMINING SPOUSAL SUPPORT—*See*
DIVORCE 2

FAMILY LAW—*See*
DIVORCE 1, 2
PARENT AND CHILD 1

FEES FOR APPEALS—*See*
APPEAL 1

FIFTH AMENDMENT—*See*
CONSTITUTIONAL LAW 1
PAROLE 2

FINAL ASSESSMENTS—*See*
TAXATION 7, 8

FIREARMS—*See*
WEAPONS 1

FIRST-DEGREE CHILD ABUSE—*See*
CRIMINAL LAW 2

FIRST-DEGREE CRIMINAL SEXUAL CONDUCT—*See*
CRIMINAL LAW 4

FIRST-DEGREE MURDER—*See*
STATUTES 1

FIRST MORTGAGES OF RECORD—*See*
CONDOMINIUMS 1

FOREIGN JUDGMENTS—*See*
JUDGMENTS 1

FOURTEENTH AMENDMENT—*See*
CONSTITUTIONAL LAW 2, 3
PAROLE 1

FOURTH AMENDMENT—*See*

CONSTITUTIONAL LAW 8

GAMING—*See*

INDIANS 1

GENERAL SALES TAX ACT—*See*

ADMINISTRATIVE LAW 2

TAXATION 5, 6, 10, 11

GOODS SOLD AT RETAIL—*See*

TAXATION 11

GOVERNMENTAL EMPLOYEES—*See*

GOVERNMENTAL IMMUNITY 1, 2

GOVERNMENTAL IMMUNITY

GOVERNMENTAL EMPLOYEES

1. A governmental employee is entitled to immunity from suit for intentional torts based on acts that were (1) undertaken during the course of employment if the employee was or reasonably believed he or she was acting within the scope of his or her authority, (2) undertaken in good faith or not with malice, and (3) discretionary as opposed to ministerial; whether a governmental employee who used deadly force exercised poor judgment in doing so or was mistaken that the use of deadly force was justified is irrelevant to whether that employee is entitled to immunity from suit (MCL 691.1407[2]). *Latits v Phillips*, 298 Mich App 109.
2. Whether the gravamen of an action involves an intentional tort or negligence is determined by considering the entire claim; a claim based on an intentional tort may not be transformed by artful pleading into a claim of gross negligence in order to avoid a defense of governmental immunity (MCL 691.1407[2]). *Latits v Phillips*, 298 Mich App 109.

GROSS NEGLIGENCE—*See*

GOVERNMENTAL IMMUNITY 2

HABITUAL OFFENDERS—*See*

SENTENCES 1

HEADLEE AMENDMENT—*See*

CONSTITUTIONAL LAW 5, 6

HEARINGS ON SEXUAL DELINQUENCY—*See*

CRIMINAL LAW 6

HEARINGS REGARDING ENLARGEMENT OF DRAINAGE DISTRICTS—*See*

DRAINS 4

HOLMES YOUTHFUL TRAINEE ACT—*See*

SENTENCES 3

HOMICIDE

See, also, STATUTES 1

INFERENCES DRAWN BY JURY

1. *People v Marshall*, 298 Mich App 607.

SECOND-DEGREE MURDER

2. *People v Portellos*, 298 Mich App 431.

IMPLIED CONTRACTS—*See*

CONTRACTS 1

IMPROVEMENTS TO REAL PROPERTY—*See*

LIMITATION OF ACTIONS 1

INABILITY TO PAY ATTORNEY FEES—*See*

ATTORNEY FEES 1

INDECENT EXPOSURE—*See*

CONSTITUTIONAL LAW 1

CRIMINAL LAW 6

INDIAN LAND—*See*

JURISDICTION 1

INDIANS

TRIBAL-STATE COMPACTS

1. Under 25 USC 2710(d)(3)(C)(i) and (ii), while a tribal-state compact may include provisions that apply to state criminal laws and allocate criminal jurisdiction between the state and Indian tribe as to the enforcement of laws,

the laws must directly relate to, and be necessary for, the licensing and regulation of gaming activities. *People v Collins*, 298 Mich App 166.

INEFFECTIVE ASSISTANCE OF COUNSEL—*See*

CONSTITUTIONAL LAW 4

INFERENCES DRAWN BY JURY—*See*

HOMICIDE 1

INJURED WORKERS—*See*

WORKERS' COMPENSATION 1, 2

INSURANCE

ACTIONS

1. A court should determine coverage issues in a declaratory judgment action before an appraisal process is employed to determine the damage to an insured's property when an insurer and its insured cannot agree on coverage under an insurance policy; issues involving an insurance policy's coverage are generally for the court to determine; an appraisal process cannot legally settle coverage issues; an insured waives its coverage-based challenge and is bound by an appraisal award, absent bad faith, fraud, misconduct, or manifest mistake, when the parties stipulated to submit the insured's insurance claim for a loss for an appraisal without first seeking to have the trial court determine the coverage challenge. *Acorn Investment Co v Michigan Basic Property Ins Ass'n*, 298 Mich App 558.

COMMERCIAL INSURANCE POLICIES

2. A commercial insurance policy that provides coverage for dishonest acts committed by an employee with the intent to cause the company to sustain loss and the employee to obtain a financial benefit but excludes coverage for benefits earned in the normal course of employment, including salaries, excludes only those payments knowingly made by an insured to an employee as a consequence of their employment relationship and in recognition of the employee's performance of job-related duties; the fact that money was embezzled from a payroll account does not render it salary for purposes of contractual exclusions from employee-dishonesty cov-

erage for earned benefits. *Amerisure Ins Co v DeBruyn Produce Co*, 298 Mich App 137.

CONTRACTS

3. Insurance contracts must be interpreted according to the terms in the contract and when the terms are clear, they must be enforced as written; an insurance contract containing a business-use exclusion stating that the insurer is not liable for bodily injury or property damage while a covered automobile is used to carry property in any business, does not apply only when the covered automobile is carrying property at the time of an accident; rather, the exclusion applies when an accident occurs during an interval of time when the automobile is employed for the purpose of carrying property in a business. *Hunt v Drielick*, 298 Mich App 548.

NO-FAULT

4. *Bronson Methodist Hospital v Michigan Assigned Claims Facility*, 298 Mich App 192.
5. A no-fault insurer is liable to pay benefits for work loss consisting of the loss of income from work that an injured person would have performed during the first three years after the date of the accident if he or she had not been injured; the statute does not limit the benefit to an injured person's lost wages, but rather includes other sources from work as well; a person who is the sole shareholder and sole employee of a profitable subchapter S corporation is entitled under the no-fault act to work-loss benefits on the basis of both the W-2 wages and the flow-through profits he or she received from the subchapter S corporation because to do otherwise would have placed the no-fault claimant in a worse position than he or she would have been in had the accident not occurred (MCL 500.3107[b]). *Brown v Home-Owners Ins Co*, 298 Mich App 678.
6. The no-fault act provides for an award of attorney fees to a claimant if the court determines that the insurer unreasonably refused to pay the claim or unreasonably delayed making a proper payment; for attorney fees to be awarded, the benefit must be overdue and the court must determine in a postjudgment proceeding that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment; if the lack of timeliness in payment is established, the insurer bears the burden of justifying the refusal or delay; the insurer

may justify its delay or refusal to pay benefits by showing that the claim presented a legitimate question of statutory construction, constitutional law, or factual uncertainty; the trier of fact's ultimate decision that the insurer owed benefits to the claimant does not alone establish the unreasonableness of the insurer's initial decision; the court must examine the circumstances as they existed at the time the insurer made the decision, and decide whether that decision was reasonable at that time (MCL 500.3148[1]). *Brown v Home-Owners Ins Co*, 298 Mich App 678.

7. There are two exceptions to the general rule that the no-fault act abolished tort liability for harm caused while owning, maintaining, or using a motor vehicle in Michigan; the threshold exception to tort immunity, MCL 500.3135(1), allows an injured party to recover damages for noneconomic losses if he or she has suffered death, serious impairment of body function, or permanent serious disfigurement; the intentional-act exception, MCL 500.3135(3)(a), allows an injured party to recover noneconomic damages if the at-fault driver intentionally caused the harm to person or property; the uninsured-motorist restriction, MCL 500.3135(2)(c), states that damages may not be assessed in favor of a party if he or she did not have insurance as security in effect at the time the injury occurred; the uninsured-motorist restriction applies only to tort claims arising under the threshold exception, MCL 500.3135(1) of the no-fault act; the language of MCL 500.3135(3)(a) explicitly provides that in spite of any other provision of law, the no-fault act's grant of immunity from tort liability does not extend to liability arising from a defendant's intentional conduct. *Gray v Chrostowski*, 298 Mich App 769.

INTELLECTUAL PROPERTY—*See*

TAXATION 12

INTENT TO KILL—*See*

HOMICIDE 1

INTENTIONAL TORTS—*See*

GOVERNMENTAL IMMUNITY 1, 2

INSURANCE 7

INTENTIONALLY CAUSED HARM UNDER NO-FAULT ACT—*See*

INSURANCE 7

INTERFERENCE WITH ADMINISTRATION OF JUSTICE OR RENDERING OF EMERGENCY SERVICES—*See*

SENTENCES 11

INTERNAL REVENUE CODE—*See*

TAXATION 12

INTERPRETIVE RULES—*See*

ADMINISTRATIVE LAW 1

IRREVOCABLE TRUSTS—*See*

TRUSTS 1

JAIL TERMS—*See*

CRIMINAL LAW 7

JUDGMENTS

See, also, COSTS 1

FOREIGN JUDGMENTS

1. A foreign child support judgment may be enforced under either the principle of comity or the Uniform Interstate Family Support Act, MCL 552.1101 *et seq*.; the standards for relief under either avenue are different and unrelated to each other; the principle of comity is the recognition of one nation for the legislative, executive, or judicial acts of another nation while giving due regard to both the international duty and convenience of such recognition and to the rights of its own citizens or other persons under the protection of the one nation's laws; to determine whether full effect should be given to a judgment of a foreign country on the basis of comity, a court should consider (1) whether there was a full, fair, and impartial trial before the foreign court, (2) whether the party appeared or there was a citation to appear in the foreign court, (3) whether an impartial administration of justice was likely to be secured between the citizens of the foreign country and those of other countries, and (4) whether there was no evidence of prejudice in the court or the system of laws under which it

was sitting or fraud in the procurement of the judgment; if these circumstances are found to exist, the foreign judgment is prima facie evidence of the truth of the matters adjudged. *Gaudreau v Kelly*, 298 Mich App 148.

JUDICIAL DECISIONS—*See*

PUBLIC UTILITIES 2

JUDICIAL FUNCTIONS—*See*

COURTS 2

JUDICIAL SUPERVISION—*See*

TRUSTS 2

JURISDICTION

STATE COURTS

1. Michigan has statutory territorial jurisdiction over any crime in which any act constituting an element of the crime is committed within Michigan; jurisdiction over crimes occurring in Indian country is governed by a complex patchwork of federal, state, and tribal law; state courts have exclusive jurisdiction over crimes committed by a non-Indian against a non-Indian in Indian country, as well as over victimless crimes committed by a non-Indian in Indian country. *People v Collins*, 298 Mich App 166.

JURY

See, also, CRIMINAL LAW 8

COMMUNICATIONS WITH JURY

1. *People v Marshall*, 298 Mich App 607.

JURY CONSIDERATION OF TRANSCRIPTS—*See*

EVIDENCE 3

JUVENILE OFFENDERS—*See*

CONSTITUTIONAL LAW 9, 10

STATUTES 1

JUVENILE OFFENSES—*See*

SENTENCES 8

LABOR RELATIONS

WHISTLEBLOWERS' PROTECTION ACT

1. The elements of a prima facie case under the Whistle-

blowers' Protection Act are (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action; under the act, protected activity includes reporting to a public body a violation of a law, regulation, or rule; for an employer's action to amount to an adverse employment action, the action must be materially adverse, meaning that it must be more than a mere inconvenience or an alteration of job responsibilities; nonrenewal of an employment contract may constitute an adverse employment action under the act; whether nonrenewal of a contract amounts to an adverse employment action in a particular instance will depend on the circumstances of the case (MCL 15.361 *et seq*.). *Wurtz v Beecher Metro Dist*, 298 Mich App 75.

LAST ANTECEDENT RULE—*See*

COUNTIES 2

LIBRARIES—*See*

WEAPONS 1

LICENSING AND REGULATION OF GAMING ACTIVITIES—*See*

INDIANS 1

LIENS—*See*

CONDOMINIUMS 1

LIFE IMPRISONMENT WITHOUT PAROLE—*See*

CONSTITUTIONAL LAW 9, 10

STATUTES 1

LIFETIME ELECTRONIC MONITORING—*See*

CRIMINAL LAW 4

LIMITATION OF ACTIONS

See, also, TAXATION 1, 2, 3, 4

NEGLIGENCE

1. MCL 600.5839 provides that a person may not maintain an action to recover damages for bodily injury arising out

of the defective or unsafe condition of an improvement to real property against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, unless the action is commenced within six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement; the following factors should be examined in determining whether an addition constitutes an improvement to real property: (1) the general nature of the addition, (2) whether the addition is an integral component or essential to the operation of the property, (3) whether the purchase, placement, and utilization of the addition required the expenditure of labor and money and increased the usefulness of, added value to, bettered, or enhanced the capital value of the property in relationship to the property's intended use and purpose, and (4) the permanence of the addition, taking into consideration whether it was affixed, bolted, mounted, or otherwise physically annexed to the property and whether its placement has been, or was intended to be, longstanding or for an indefinite period; the fact that an addition may be removed without damaging the property does not preclude a finding of permanence. *Caron v Cranbrook Ed Community*, 298 Mich App 629.

LOCAL REGULATIONS—*See*

CONSTITUTIONAL LAW 7

LOCAL UNITS OF GOVERNMENT—*See*

WEAPONS 1

LONG-TERM DISABILITY INSURANCE BENEFITS—*See*

CIVIL SERVICE 1

LOST WAGES—*See*

INSURANCE 5

MAINTAIN DEFINED FOR PURPOSES OF HEADLEE AMENDMENT ACTIONS—*See*

CONSTITUTIONAL LAW 5

MAINTENANCE AND REPAIR—*See*

DRAINS 2

MALPRACTICE—*See*
LIMITATION OF ACTIONS 1
MANDATORY JAIL TERMS—*See*
CRIMINAL LAW 7
MANDATORY LIFE IMPRISONMENT—*See*
CONSTITUTIONAL LAW 9, 10
STATUTES 1
MANUSCRIPTS—*See*
TAXATION 12
MARIJUANA—*See*
CONTROLLED SUBSTANCES 2
MARITAL ASSETS—*See*
DIVORCE 1
MEDIATION SANCTIONS—*See*
COSTS 1
MEDICAL MARIJUANA—*See*
CONTROLLED SUBSTANCES 2
MEDICAL SERVICES FOR INJURED WORKERS—*See*
WORKERS' COMPENSATION 1, 2
MICHIGAN ADMINISTRATIVE CODE—*See*
ADMINISTRATIVE LAW 2
MICHIGAN MEDICAL MARIHUANA ACT—*See*
CONTROLLED SUBSTANCES 2
MICHIGAN TRUST CODE—*See*
TRUSTS 3
MINORS—*See*
CONSTITUTIONAL LAW 9, 10
STATUTES 1
MISCONDUCT—*See*
PROSECUTING ATTORNEYS 1

MORTGAGES—*See*
CONDOMINIUMS 1
MOTIONS TO CHANGE VENUE—*See*
VENUE 1
MOTOR VEHICLE DEALERS ACT—*See*
ACTIONS 1
MOTOR VEHICLES—*See*
CRIMINAL LAW 7
INSURANCE 4, 5, 6, 7
MULTIPLE PUNISHMENTS—*See*
CONSTITUTIONAL LAW 1
MUNICIPAL CORPORATIONS—*See*
DRAINS 3
MURDER—*See*
HOMICIDE 1, 2
STATUTES 1
NAMED-PERSON EXCLUSIONS FROM NO-FAULT COVERAGE—*See*
INSURANCE 4
NECESSITY HEARINGS—*See*
DRAINS 4
NEGLIGENCE—*See*
GOVERNMENTAL IMMUNITY 2
LIMITATION OF ACTIONS 1
NEW MOTOR VEHICLE DEALERS IN AREA ALREADY SERVED—*See*
ACTIONS 1
NO-FAULT—*See*
INSURANCE 4, 5, 6, 7
NON-INDIANS—*See*
JURISDICTION 1

NONJUDICIAL SETTLEMENT AGREEMENTS—*See*
TRUSTS 3

NONRENEWAL OF AN EMPLOYMENT CONTRACT—*See*
LABOR RELATIONS 1

NOTES FROM JURY—*See*
JURY 1

NOTICE DEFINED—*See*
TAXATION 7, 8

NOTICE OF INTENT TO ENHANCE SENTENCE—*See*
SENTENCES 1

NOTICES AND LETTERS REGARDING DISPUTES—*See*
TAXATION 2, 4

OBJECTIVE AND VERIFIABLE FACTORS FOR DEPARTURES—*See*
SENTENCES 9

OCCUPANT'S CONSENT TO SEARCHES—*See*
CONSTITUTIONAL LAW 8

OFFENSE VARIABLE 3—*See*
SENTENCES 7, 10

OFFENSE VARIABLE 4—*See*
SENTENCES 2, 7

OFFENSE VARIABLE 5—*See*
SENTENCES 10

OFFENSE VARIABLE 10—*See*
SENTENCES 6

OFFENSE VARIABLE 11—*See*
SENTENCES 4, 5

OFFENSE VARIABLE 19—*See*
SENTENCES 11

OPERATING A MOTOR VEHICLE WHILE INTOXICATED—*See*

CRIMINAL LAW 7

ORAL ARGUMENT—*See*

APPEAL 2

ORDERS—*See*

COSTS 1

ORDERS OF THE DEPARTMENT OF TREASURY—*See*

TAXATION 1, 3

OTHER-ACTS EVIDENCE—*See*

CRIMINAL LAW 5

OWNERS OF VEHICLES—*See*

INSURANCE 4

PARALLEL NOTICE REQUIREMENTS—*See*

TAXATION 2, 4

PARENT AND CHILD

ADOPTION

1. After the entry of an adoption order, the person or persons adopting the adoptee become the parent or parents of the adoptee under the law as though the adopted person had been born to the adopting parents, and the adopting parents are liable for all the duties and entitled to all the rights of parents; the adoption statute effectively makes the adopted child a natural child of the adopting parents and the adopting parents the natural parents of the child, severing at law the prior, natural family relationship and creating a new and complete substitute relationship after adoption; adoption severs the family relationship between any biological siblings who are not adopted by the same adopting parents and they are no longer siblings (MCL 710.60[1]). *Wilson v King*, 298 Mich App 378.

PAROLE

APPEAL OF PAROLE ORDERS

1. Under MCR 7.118(D)(3)(b)(i), a prisoner may respond to

a prosecutor's appeal of a parole-release decision through retained counsel or in propria persona; the court rule does not violate the Equal Protection Clause because an incarcerated prisoner involved in the parole process is not a member of a suspect class and does not have a due process liberty interest; although MCR 7.119(D)(3)(b)(i) may result in some inequality, it is rationally related to the legitimate governmental purpose of preserving scarce court resources. *In re Parole of Hill*, 298 Mich App 404.

PAROLE BOARD

2. An indigent criminal defendant has a due process right to appointed counsel at every stage of every criminal proceeding when the substantial rights of the accused criminal may be affected; the mere fact that a state has a parole process is insufficient to confer a protected liberty interest to a prisoner and the possibility of parole provides no more than a mere hope that the benefit will be obtained; when a Parole Board grants parole the incarcerated defendant does not have a due process right to appointed counsel during a prosecutor's or victim's appeal, brought under MCL 791.234(11), of the Parole Board's decision; a liberty interest is triggered only after the Parole Board's order has been effectuated by the prisoner's release from prison. *In re Parole of Hill*, 298 Mich App 404.

PAROLE FOR JUVENILE OFFENDERS—*See*

CONSTITUTIONAL LAW 9, 10

STATUTES 1

PERIODS OF LIMITATIONS—*See*

LIMITATION OF ACTIONS 1

PERSONAL PROPERTY—*See*

TAXATION 12

PERSONAL PROTECTION INSURANCE BENEFITS—*See*

INSURANCE 4

PETITIONS TO ESTABLISH DRAINS—*See*

DRAINS 1

PETITIONS TO INITIATE DRAINAGE PROJECTS—*See*
DRAINS 3

PETITIONS TO MAINTAIN OR REPAIR DRAINS—*See*
DRAINS 2

PHYSICAL INJURY TO VICTIMS—*See*
SENTENCES 7, 10

PLEADING—*See*
GOVERNMENTAL IMMUNITY 2

PRACTICABILITY HEARINGS—*See*
DRAINS 5

PREDATORY CONDUCT DEFINED—*See*
SENTENCES 6

PREEMPTION OF LOCAL REGULATIONS—*See*
CONSTITUTIONAL LAW 7
WEAPONS 1

PRESENCE OF DEFENDANT—*See*
CRIMINAL LAW 8

PRIMA FACIE EVIDENCE OF RETALIATORY DISCHARGE—*See*
WORKERS' COMPENSATION 2

PRIOR BAD ACTS—*See*
CRIMINAL LAW 5

PRIOR RECORD VARIABLE 1—*See*
SENTENCES 3

PRIOR RECORD VARIABLE 6—*See*
SENTENCES 8

PRIORITY OF CONDOMINIUM-ASSOCIATION LIENS—*See*
CONDOMINIUMS 1

PRISONERS—*See*
COURTS 1
PAROLE 1, 2
PROBATE COURTS—*See*
TRUSTS 1, 2
PROBATION FOR JUVENILE OFFENSE—*See*
SENTENCES 8
PROCEDURAL DUE PROCESS—*See*
CONSTITUTIONAL LAW 3
PROMISSORY ESTOPPEL—*See*
ESTOPPEL 1
PROPERTY—*See*
TAXATION 12
PROPERTY IMPROVEMENTS—*See*
LIMITATION OF ACTIONS 1
PROPERTY TAX—*See*
TAXATION 9
PROPOSED PROJECTS—*See*
DRAINS 5
PROSECUTING ATTORNEYS
MISCONDUCT
1. *People v Marshall*, 298 Mich App 607.
PROSPECTIVE APPLICATION OF JUDICIAL DECISIONS—*See*
PUBLIC UTILITIES 2
PSYCHOLOGICAL INJURY TO VICTIM'S FAMILY—*See*
SENTENCES 10
PSYCHOLOGICAL INJURY TO VICTIMS—*See*
SENTENCES 2, 7
PUBLIC SERVICE COMMISSION—*See*
PUBLIC UTILITIES 1

PUBLIC UTILITIES

WIND ENERGY

1. An independent transmission company seeking an expedited siting certificate for construction of a wind energy transmission line under part 4 of 2008 PA 295 must submit a construction plan to the Public Service Commission and be granted a certificate of public convenience and necessity pursuant to 1995 PA 30 before beginning construction. *In re International Transmission Co for Expedited Siting Certificate Application*, 298 Mich App 338.
2. Judicial decisions are generally given full retroactive effect; a decision that clearly establishes a new principle of law may be given prospective application if warranted by consideration of (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice; the decision requiring independent transmission companies seeking an expedited siting certificate for construction of a wind energy transmission line under part 4 of 2008 PA 295 to also comply with 1995 PA 30 before beginning construction applies prospectively. *In re International Transmission Co for Expedited Siting Certificate Application*, 298 Mich App 338.
3. MCL 460.1153(3)(d) requires a proposed transmission line to be of appropriate capability to enable the wind potential of a wind energy resource zone to be realized; a capability that cannot accommodate the maximum estimated wind potential arguably fails to meet this standard. *In re International Transmission Co for Expedited Siting Certificate Application*, 298 Mich App 338.

QUASI-MUNICIPAL AGENCIES—*See*

WEAPONS 1

REAL PROPERTY—*See*

TAXATION 9

REAL PROPERTY IMPROVEMENTS—*See*

LIMITATION OF ACTIONS 1

RECORDING OF MORTGAGES—*See*

CONDOMINIUMS 1

REGULATIONS—*See*

CONSTITUTIONAL LAW 7

RELATIONSHIP TO THE CRIMINAL JUSTICE SYSTEM—*See*

SENTENCES 8

RELEVANCE—*See*

EVIDENCE 2

REMEDIES FOR VIOLATIONS OF RIGHT TO ORAL ARGUMENT—*See*

APPEAL 1

REPRESENTATIVES DESIGNATED BY TAXPAYERS—*See*

TAXATION 2, 4, 7, 8

RESISTING ARREST—*See*

EVIDENCE 2

RESOLUTIONS OF COUNTY COMMISSIONS—*See*

CONTRACTS 1

COUNTIES 2

RESOLUTIONS TO MAINTAIN OR REPAIR DRAINS—*See*

DRAINS 2

RETAIL SALE OF GOODS—*See*

TAXATION 11

RETALIATORY DISCHARGE—*See*

WORKERS' COMPENSATION 1, 2

RETIREMENT BENEFITS—*See*

COUNTIES 2

RETROACTIVE APPLICATION OF JUDICIAL DECISIONS—*See*

PUBLIC UTILITIES 2

RETROACTIVE APPLICATION OF NEW CRIMINAL PROCEDURE RULES—*See*
CONSTITUTIONAL LAW 10

RETURNED GOODS CREDIT OR REFUND—*See*
ADMINISTRATIVE LAW 2
TAXATION 10

REVENUE COLLECTION ACT—*See*
TAXATION 5, 6

RIGHT TO ORAL ARGUMENT—*See*
APPEAL 2

RIGHT TO PRESENT A DEFENSE—*See*
EVIDENCE 2

RIPENESS—*See*
ACTIONS 1

RULEMAKING—*See*
ADMINISTRATIVE LAW 1

SALARY EXCLUSIONS FROM COVERAGE—*See*
INSURANCE 2

SALES TAX—*See*
ADMINISTRATIVE LAW 2
TAXATION 5, 6, 10, 11

SAME-ELEMENTS TEST—*See*
CONSTITUTIONAL LAW 1

SEARCHES AND SEIZURES—*See*
CONSTITUTIONAL LAW 8

SECOND-DEGREE MURDER—*See*
HOMICIDE 2

SEEKING MEDICAL SERVICES—*See*
WORKERS' COMPENSATION 1, 2

SENTENCES

See, also, CONSTITUTIONAL LAW 9, 10
CRIMINAL LAW 4, 7
STATUTES 1

HABITUAL OFFENDERS

1. A prosecuting attorney seeking to enhance the sentence of a criminal defendant because of the defendant's status as an habitual offender must file a written notice of the intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense; the date of the defendant's bindover from the district court to the circuit court on the underlying offense is not an appropriate date from which to measure the timeliness of the notice (MCL 769.13[1]). *People v Marshall*, 298 Mich App 607.

SENTENCING GUIDELINES

2. Offense variable 4, MCL 777.34(1)(a), which considers the psychological injury to the victim, should be assigned 10 points if the defendant suffered serious psychological injury that required or may require professional treatment; failure to seek professional treatment is not conclusive proof of a lack of psychological injury; assignment of 10 points is appropriate if there is evidence that the victim was fearful during the crime, or was left feeling angry, and was trying to block out the memory of the crime. *People v Williams*, 298 Mich App 121.
3. The assignment to youthful-trainee status following a plea of guilty under the Holmes Youthful Trainee Act, MCL 762.11 *et seq*., which is imposed as an alternative to a conventional criminal conviction and sentence, constitutes a conviction when assessing points for prior record variable 1 of the sentencing guidelines. [MCL 777.50(4)(a)(i).] *People v Williams*, 298 Mich App 121.
4. Vaginal penetration, fellatio, and cunnilingus are considered separate sexual penetrations for purposes of scoring offense variable 11, which addresses criminal sexual penetrations (MCL 777.41). *People v Johnson*, 298 Mich App 128.
5. The phrase "arising out of" used in the statute regard-

ing the scoring of offense variable 11 (criminal sexual penetrations) refers to something that springs from or results from something else or has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen; the instruction in the statute to score all sexual penetrations of the victim by the offender arising out of the sentencing offense therefore requires more than the mere fact that the penetrations involved the same defendant and victim in order for them to be considered to have arisen out of the sentencing offense (MCL 777.41[2][a]). *People v Johnson*, 298 Mich App 128.

6. "Predatory conduct," for purposes of scoring offense variable 10 regarding exploitation of a vulnerable victim, is conduct that occurred before the commission of the scoring offense and that was directed at the victim for the primary purpose of victimization (MCL 777.40[3][a]). *People v Johnson*, 298 Mich App 128.
7. *People v Anderson*, 298 Mich App 178.
8. Prior record variable (PRV) 6, MCL 777.56, considers an offender's relationship to the criminal justice system; under PRV 6, the trial court must assess 10 points if, at the time of the sentencing offense, the offender was on parole, probation, or delayed sentence status and zero points if the offender had no relationship to the criminal justice system; juvenile adjudications create a relationship with the criminal justice system, and a sentencing court may assess 10 points for PRV 6 if a defendant was on probation for a juvenile offense at the time of the sentencing offense. *People v Anderson*, 298 Mich App 178.
9. Under the legislative sentencing guidelines, a sentencing court may depart from the appropriate minimum sentence range if it has a substantial and compelling reason for that departure and states its reasons on the record; in order to be substantial and compelling, the reasons must be objective and verifiable, that is, based on actions or occurrences external to the minds of those involved in the decision and capable of being confirmed; a determination that a defendant should have done more to help the victims escape the consequences of his or her crime is not objective and verifiable. *People v Anderson*, 298 Mich App 178.
10. *People v Portellos*, 298 Mich App 431.

11. Offense variable (OV) 19, MCL 777.49, is scored, among other reasons, if the defendant interfered with the administration of justice or the rendering of emergency services; under OV 19, the court (1) must assess 15 points under MCL 777.49(b) if the offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services, (2) must assess 10 points under MCL 777.49(c) if the offender otherwise interfered with or attempted to interfere with the administration of justice, and (3) must assess zero points under MCL 777.49(d) if the offender did not threaten the security of a penal institution or court or interfere with the administration of justice or the rendering of emergency services by force or threat of force; lying to emergency-services personnel does not constitute otherwise interfering with the administration of justice under MCL 777.49(c). *People v Portellos*, 298 Mich App 431.

SENTENCING GUIDELINES—*See*

SENTENCES 2, 3, 4, 5, 6, 7, 8, 9, 10, 11

SERIOUS PSYCHOLOGICAL INJURY—*See*

SENTENCES 10

SETTLEMENT AGREEMENTS—*See*

COURTS 3

TRUSTS 3

SETTLEMENTS—*See*

COSTS 1

SEXUAL PENETRATIONS—*See*

SENTENCES 4, 5

SEXUALLY DELINQUENT PERSONS—*See*

CRIMINAL LAW 6

SIBLING VISITATION OF ADOPTED CHILDREN—*See*

PARENT AND CHILD 1

SINGLE BUSINESS TAX ACT—*See*

TAXATION 12

SITING CERTIFICATES—*See*

PUBLIC UTILITIES 1

SIXTH AMENDMENT—*See*

CONSTITUTIONAL LAW 4

CRIMINAL LAW 1

PAROLE 1, 2

SPOUSAL SUPPORT—*See*

DIVORCE 2

STATE COURTS—*See*

JURISDICTION 1

STATUTES

See, also, CONSTITUTIONAL LAW 7

CONSTITUTIONAL LAW

1. MCL 791.234(6)(a), which excludes any prisoner serving a life sentence for first-degree murder from eligibility for parole, is unconstitutional as written and as applied to juvenile offenders under the age of 18 convicted of homicide because it fails to acknowledge a sentencing court's discretion to determine that a convicted juvenile homicide offender may be eligible for parole. *People v Carp*, 298 Mich App 472.

STATUTES CREATING CONTRACTS—*See*

CONTRACTS 1

STATUTES OF LIMITATIONS—*See*

LIMITATION OF ACTIONS 1

STATUTORY CONSTRUCTION—*See*

COUNTIES 2

STIPULATED FACTS IN SUBMISSION OF CASE—*See*

TAXATION 9

SUBCHAPTER S CORPORATIONS—*See*

INSURANCE 5

SUBMISSION OF CONSTRUCTION PLANS FOR WIND ENERGY TRANSMISSION LINES—*See*

PUBLIC UTILITIES 1

SUBSTANTIVE DUE PROCESS—*See*

CONSTITUTIONAL LAW 2

SUBSTITUTION OF COUNSEL—*See*

CRIMINAL LAW 1

SUFFICIENCY OF THE EVIDENCE—*See*

CRIMINAL LAW 2

HOMICIDE 2

SUMMARY DISPOSITION—*See*

EVIDENCE 1

SUPERVISION OF TRUSTS—*See*

TRUSTS 2

SURVEYS—*See*

DRAINS 5

TANGIBLE PERSONAL PROPERTY—*See*

TAXATION 12

TAX TRIBUNAL—*See*

TAXATION 1, 2, 3, 4

TAXABLE VALUE—*See*

TAXATION 9

TAXATION

See, also, ADMINISTRATIVE LAW 2

APPEAL

1. A taxpayer may appeal the contested portion of an assessment, decision, or order of the Department of Treasury in the Tax Tribunal within 35 days, or in the Court of Claims within 90 days, after the assessment, decision, or order; if an appeal is not filed within the relevant period, the assessment, decision, or order is final and not reviewable in any court by mandamus,

appeal, or other method of direct or collateral attack (MCL 205.22[1] and [4]). *Fradco, Inc v Dep't of Treasury*, 298 Mich App 292.

2. The provisions of MCL 205.8 and MCL 205.28(1) of the revenue collection act impose parallel notice requirements whenever a taxpayer has a valid written request filed with the Department of Treasury requesting that copies of letters and notices regarding a dispute with the taxpayer be sent to a representative designated by the taxpayer; if a taxpayer has filed a proper request, the department must give notice to both the taxpayer and the taxpayer's designated representative before the 35-day period within which the taxpayer may appeal the contested portion of an assessment, decision, or order of the department in the Tax Tribunal begins to run (MCL 205.22[1]). *Fradco, Inc v Dep't of Treasury*, 298 Mich App 292.
3. A taxpayer may appeal the contested portion of an assessment, decision, or order of the Department of Treasury in the Tax Tribunal within 35 days, or in the Court of Claims within 90 days, after the assessment, decision, or order; if an appeal is not filed within the relevant period, the assessment, decision, or order is final and not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack (MCL 205.22[1] and [4]). *SMK, LLC v Dep't of Treasury*, 298 Mich App 302.
4. The provisions of MCL 205.8 and MCL 205.28(1) of the revenue collection act impose parallel notice requirements whenever a taxpayer has a valid written request filed with the Department of Treasury requesting that copies of letters and notices regarding a dispute with the taxpayer be sent to a representative designated by the taxpayer; if a taxpayer has filed a proper request, the department must give notice to both the taxpayer and the taxpayer's designated representative before the 35-day period within which the taxpayer may appeal the contested portion of an assessment, decision, or order of the department in the Tax Tribunal begins to run (MCL 205.22[1]). *SMK, LLC v Dep't of Treasury*, 298 Mich App 302.

CONFLICT OF LAWS

5. The Department of Treasury must follow the provisions of the revenue collection act, MCL 205.1 *et seq*., when

imposing taxes under the General Sales Tax Act, MCL 205.51 *et seq*., unless the provisions of the revenue collection act and the General Sales Tax Act conflict, in which event the provisions of the General Sales Tax Act apply (MCL 205.59[1]). *Fradco, Inc v Dep't of Treasury*, 298 Mich App 292.

6. The Department of Treasury must follow the provisions of the revenue collection act, MCL 205.1 *et seq*., when imposing taxes under the General Sales Tax Act, MCL 205.51 *et seq*., unless the provisions of the revenue collection act and the General Sales Tax Act conflict, in which event the provisions of the General Sales Tax Act apply (MCL 205.59[1]). *SMK, LLC v Dep't of Treasury*, 298 Mich App 302.

FINAL ASSESSMENTS

7. A final assessment by the Department of Treasury is a "notice" for purposes of the statute that requires the department to send copies of letters and notices regarding a dispute with a taxpayer to the official representative of the taxpayer whenever the taxpayer has filed with the department a valid written request for such notice (MCL 205.8). *Fradco, Inc v Dep't of Treasury*, 298 Mich App 292.

8. A final assessment by the Department of Treasury is a "notice" for purposes of the statute that requires the department to send copies of letters and notices regarding a dispute with a taxpayer to the official representative of the taxpayer whenever the taxpayer has filed with the department a valid written request for such notice (MCL 205.8). *SMK, LLC v Dep't of Treasury*, 298 Mich App 302.

PROPERTY TAX

9. When parties agree to submit a case on stipulated facts, courts generally accept those facts as conclusive. *Toll Northville Ltd Partnership v Northville Twp (On Remand)*, 298 Mich App 41.

SALES TAX

10. A six percent sales tax is imposed under the General Sales Tax Act on the gross proceeds of all persons engaged in the business of making sales at retail by which ownership of tangible personal property is transferred for consideration; a taxpayer may claim a credit or refund of sales tax for returned goods (MCL

205.52[1]; MCL 205.56b). *Discount Tire Co v Dep't of Treasury*, 298 Mich App 367.

11. The use tax does not apply to goods sold at retail; the sales tax applies to goods sold at retail; the use tax is complementary to the sales tax, and the two taxes cannot be imposed on the same transaction (MCL 205.51 *et seq*.; MCL 205.91 *et seq*.). *Discount Tire Co v Dep't of Treasury*, 298 Mich App 367.

SINGLE BUSINESS TAX ACT

12. *Random House, Inc v Dep't of Treasury*, 298 Mich App 566.

TETHERS—*See*

CRIMINAL LAW 4, 7

TIMELINESS OF HABITUAL-OFFENDER NOTICE—*See*

SENTENCES 1

TORT LIABILITY UNDER NO-FAULT ACT—*See*

INSURANCE 7

TORTS—*See*

GOVERNMENTAL IMMUNITY 1, 2

LIMITATION OF ACTIONS 1

VENUE 1

TRANSCRIPTS OF AUDIO RECORDINGS—*See*

EVIDENCE 3

TRANSFER OF CONTROLLED SUBSTANCES—*See*

CONTROLLED SUBSTANCES 1

TRIAL

ATTORNEY AND CLIENT

1. A party requesting an award of attorney fees bears the burden of proving the reasonableness of the fees requested; the fee applicant must demonstrate by documentation or specific testimony, or both, that the time identified as expended on a billable item was actually and reasonably expended; the trier of fact is not required to accept an itemized bill of costs on its face or to accept an attorney's representation that the hours identified in the

bill of costs were reasonably expended. *Adair v Michigan (On Third Remand)*, 298 Mich App 383.

TRIAL STRATEGIES—*See*

CONSTITUTIONAL LAW 4

TRIBAL-STATE COMPACTS—*See*

INDIANS 1

TRUSTS

COURTS

1. MCL 700.7207(1), before its amendment effective April 1, 2010, provided that on the petition of an interested person, a probate court may approve an interpretation, construction, modification, or other settlement that is agreed upon in writing by all presently identified and competent beneficiaries whose interests in the trust may be affected to resolve a contest, controversy, or question of construction or interpretation concerning the existence, administration, or termination of an irrevocable trust; MCL 700.7207(3) provided that the court shall approve an agreement described in § 7207(1) if it appears to have been reached in good faith and its effects are just and reasonable under all of the relevant facts and circumstances; MCL 700.7207(4) provided that an order entered in response to a petition under § 7207(1) is binding on each party who is represented in the proceeding and on others in accordance with MCL 700.1403(b) and that, after issuance of the order, the agreement as approved by the court shall be considered a part of the governing instrument of the trust. *In re Robert H Draves Trust*, 298 Mich App 745.

JUDICIAL SUPERVISION

2. A trust is not subject to continuing judicial supervision unless ordered by the court; a probate court will supervise a trust only upon an interested party's invocation of the court's jurisdiction (MCL 700.7201[2]; MCR 5.501[B]). *In re Robert H Draves Trust*, 298 Mich App 745.

NONJUDICIAL SETTLEMENT AGREEMENTS

3. The provision of the Michigan Trust Code regarding nonjudicial settlement agreements allows beneficiaries to resolve administrative issues without court involvement; the provision promotes the extrajudicial resolution of trust issues within a framework that relieves interested parties and the courts of the burdens and costs associated with

continue court supervision and control; the provision is inapplicable to a settlement agreement that is the result of active litigation and is not simply an extrajudicial alteration of the trust (MCL 700.7111). *In re Robert H Draves Trust*, 298 Mich App 745.

UNIFORM INTERSTATE FAMILY SUPPORT ACT—*See*

JUDGMENTS 1

UNINSURED-MOTORIST RESTRICTION—*See*

INSURANCE 7

UNREASONABLE DENIAL OF BENEFITS—*See*

INSURANCE 6

USE OF DEADLY FORCE—*See*

GOVERNMENTAL IMMUNITY 1

USE TAX—*See*

TAXATION 11

VEHICLES—*See*

CRIMINAL LAW 7

INSURANCE 4

VENUE

CHANGE OF VENUE

1. *Angelucci v Dart Properties Inc*, 298 Mich App 592.

VERDICT DEFINED—*See*

COSTS 1

VERIFYING ACCURACY OF TRANSCRIPTS—*See*

EVIDENCE 3

VICTIMS—*See*

SENTENCES 2, 6, 7, 9, 10

VISITATION OF ADOPTED CHILDREN BY SIBLINGS—*See*

PARENT AND CHILD 1

VOIR DIRE—*See*

CRIMINAL LAW 8

VULNERABLE VICTIMS—*See*

SENTENCES 6

WAIVER OF COVERAGE—*See*

INSURANCE 1

WAIVER OF RIGHT TO BE PRESENT AT TRIAL—*See*

CRIMINAL LAW 8

WARRANTLESS INVESTIGATIONS OF DOMESTIC VIOLENCE—*See*

CONSTITUTIONAL LAW 8

WARRANTLESS SEARCHES AND SEIZURES—*See*

CONSTITUTIONAL LAW 8

WATERSHED CRIMINAL PROCEDURE RULES—*See*

CONSTITUTIONAL LAW 10

WEAPONS

FIREARMS

1. MCL 123.1102 provides that a local unit of government may not enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner, the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols or other firearms, ammunition for pistols or other firearms, or components of pistols or other firearms except as otherwise provided by state or federal law; state law completely occupies the field of firearm regulation to the exclusion of local units of government; a district library established under MCL 397.173, while not a local unit of government as defined by MCL 123.1101(a), is nevertheless preempted as a quasi-municipal agency from regulating the possession of firearms. *Capital Area Dist Library v Michigan Open Carry, Inc*, 298 Mich App 220.

WHISTLEBLOWERS' PROTECTION ACT—*See*

LABOR RELATIONS 1

WIND ENERGY—*See*

PUBLIC UTILITIES 1, 2, 3

WITHDRAWALS OF CONSENT TO SEARCHES—*See*

CONSTITUTIONAL LAW 8

WITNESSES—*See*

PROSECUTING ATTORNEYS 1

WORDS AND PHRASES—*See*

CONSTITUTIONAL LAW 5

COSTS 1

SENTENCES 5, 6

TAXATION 7, 8

WORK-LOSS BENEFITS—*See*

INSURANCE 5

WORKERS' COMPENSATION

RETALIATORY DISCHARGE

1. Filing a petition for workers' compensation benefits is not a prerequisite to all retaliatory-discharge claims; under MCL 418.301(13), a claim of retaliatory discharge may be established if an employer terminates or otherwise discriminates against an employee in retaliation (1) for filing a complaint under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., (2) for instituting or causing a proceeding to be instituted under the WDCA, or (3) because the employee exercises a right afforded by the WDCA; an injured employee who brings a claim under MCL 418.301(13) premised on the exercise of a right afforded by the WDCA must demonstrate that he or she first exercised such a right before the employer terminated or otherwise discriminated against the employee in response to that conduct; under MCL 418.315(1), an employee has the right to seek needed and reasonable medical services and medicines for work-related injuries; medical services encompasses medical consultation, evaluation, and treatment; determining whether an employee needed medical services following a workplace injury necessitates a fact-intensive reasonableness inquiry that focuses on the totality of the circumstances surrounding the employee, the workplace, the nature of the injury, and the injury's adverse effect on the employee's overall health and well-being. *Cuddington v United Health Services, Inc*, 298 Mich App 264.

2. A prima facie case of retaliation for the exercise of the right to seek reasonable and necessary services is established under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., if an employee who suffered a work-related injury presents evidence (1) that the employee asserted the right or actually exercised that right, (2) that the employer knew that the employee engaged in this protected conduct, (3) that the employer took an employment action that was adverse to the employee, and (4) that the adverse employment action and the employee's assertion or exercise of the right, which is afforded under MCL 418.315(1), were causally connected; direct evidence of retaliation is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions; when a plaintiff asserting a claim for retaliatory discharge under MCL 418.301(13) establishes a prima facie case of retaliation with circumstantial evidence, the burden of proof shifts to the defendant to articulate a legitimate, nonretaliatory reason for its adverse employment action; if the defendant produces a legitimate, nondiscriminatory reason for its action, the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is sufficient to permit a reasonable trier of fact to conclude that retaliation was a motivating factor for the adverse action taken toward the plaintiff; a plaintiff can establish that the employer's proffered reasons for the adverse employment action were pretextual by demonstrating that the reasons (1) had no basis in fact, (2) were not the actual factors motivating the decision, or (3) were insufficient to justify the decision. *Cuddington v United Health Services, Inc*, 298 Mich App 264.

YOUTHFUL-TRAINEE STATUS—*See*

SENTENCES 3

ZONING—*See*

CONSTITUTIONAL LAW 2, 3